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MARRIAGE MIMICRY: THE LAW OF DOMESTIC VIOLENCE

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ABSTRACT

In this Article, Professor Colker argues that the legal system does not simply privilege those in marital relationships but has now begun to privilege those in "marriage-like" relationships through what she terms a marriage-mimicry model. She uses the law of domestic violence to critique this model. She traces the haphazard development of the law of domestic violence and argues that it has served to underprotect many of the victims of domestic violence because lawmakers have reflexively only provided legal recourse for those in marriage-like relationships without asking who is most in need of legal protection. She argues that the legal system should disentangle privileges and benefits from marriage and, instead, use a functional approach to deciding who receives those benefits.

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INTRODUCTION

In our society, few oppose marriage.[1] Liberals, the religious Right, law and order conservatives, gay rights advocates, and even feminists, support some conception of state-supported marriage.[2] These groups often disagree on the proper role of the state in the regulation of marriage, but they are committed to law reform consistent with their version of a stronger marriage institution.[3] Because of the broad-based support for marriage within our society, no successful politician can oppose the institution.[4] Our legal system generally reflects support for the institution of marriage.[5] It also

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1. Some queer theorists and radical feminists oppose marriage, but their views are not reflected in mainstream politics. *See, e.g.*, Nitya Duclos, *Some Complicating Thoughts on Same-Sex Marriage*, 1 LAW & SEXUALITY 31, 34-35 (1991) (arguing that recognition of same-sex marriage may produce negative results for some lesbian and gay individuals); Nancy D. Polikoff, *Making Marriage Matter Less: The ALI Domestic Partner Principles Are One Step in the Right Direction*, 2004 U. CHI. LEGAL F. 353, 363-72 [hereinafter Polikoff, *Making Marriage Matter Less*]; Nancy D. Polikoff, *We Will Get What We Ask for: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1536 (1993) [hereinafter Polikoff, *We Will Get What We Ask for*] ("I believe that the desire to marry in the lesbian and gay community is an attempt to mimic the worst of mainstream society, an effort to fit into an inherently problematic institution that betrays the promise of both lesbian and gay liberation and radical feminism."); Michael Warner, *Beyond Gay Marriage*, *in* LEFT LEGALISM/LEFT CRITIQUE 259, 276-78 (Wendy Brown & Janet Halley eds., 2002) (arguing that same-sex marriage will extend efforts to "normalize" gay life and stigmatize other gay sex); Steven K. Homer, Note, *Against Marriage*, 29 HARV. C.R.-C.L. L. REV. 505, 529-30 (1994). *But see* Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9, 16-19 (1991) (arguing that same-sex marriage could destabilize marriage).

2. In this Article, I am discussing marriage as recognized by the state, in contrast with marriage as recognized by religious entities. The conception of marriage that should be supported by religious entities is beyond the scope of this Article.

3. For further discussion of these groups' conceptions of marriage, see *infra* notes 15-20.

4. Hence, the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), passed on July 12, 1996, by an overwhelming margin in Congress and was signed into law by President Clinton. It passed the House in a 342-67 vote, with 2 "present" and 22 not voting. *See* 142 CONG. REC. H7505-06 (daily ed. July 12, 1996). It passed the Senate by a vote of 85-14, with one member not voting. *See* 142 CONG. REC. S10129 (daily ed. Sept. 10, 1996).

5. After Congress enacted the Defense of Marriage Act, the Office of General Counsel of the General Accounting Office wrote a report for Representative Henry Hyde that sought to identify "federal laws in which benefits, rights, and privileges are contingent on marital status." Letter from Barry R. Bedrick, Assoc. Gen. Counsel, U.S. Gen. Accounting Office, to U.S. Representative Henry J. Hyde (Jan. 31, 1997), *available at* http://www.gao.gov/archive/1997/og97016.pdf. Remarkably, the report concluded that 1049 federal laws used marital status as a factor in the following thirteen categories: Social Security and related

privileges those who are in "marriage-like" relationships that are characterized by monogamous, long-term, intimate commitments and financial interdependence.[6] This Article terms that framework of according benefits a "marriage-mimicry" model. The legal system defines who gets privileges and benefits by discerning who is married or most like a married person rather than by asking who should receive these benefits based on the purpose of such benefits.

The law of domestic violence reflects this marriage-mimicry model.[7] Legislatures first began to provide legal recourse to married

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programs, housing, and food stamps; veterans' benefits; taxation; federal civilian and military service benefits; employment benefits and related laws; immigration, naturalization, and aliens; Indians; trade, commerce, and intellectual property; financial disclosure and conflict of interest; crimes and family violence; loans, guarantees, and payments in agriculture; federal natural resources and related laws; and miscellaneous laws. *Id.* at 2-3. For example, the surviving spouse of a public safety officer killed in the line of duty is eligible for a death benefit of up to $100,000. *Id.* at 9.

6. This Article will focus on the law of domestic violence as an example of the marriage-mimicry approach. That approach, however, is also basic to the domestic partnership movement. States are reluctant to accord same-sex couples the right to marry. Instead, they are creating registration systems so that individuals can demonstrate that they meet the traditional indicators of marriage and then acquire some of the state-provided benefits of marriage. Employers are also using this model to provide benefits to nonmarried domestic partners. Often, these registration programs are based on a more traditional notion of relationships than state marriage laws, requiring, for example, proof of financial interdependence in order for benefits to be available. As an example, The Ohio State University requires domestic partners to attest that they "are responsible for each other's common welfare" and "share a residence" to obtain global care services, whole health discount program, or dependent group life insurance. *See* The Ohio State University Office of Human Resources, Affidavit of Domestic Partnership, *available at* http://hr.osu.edu/forms/dompaaff.pdf (last visited Mar. 29, 2006). To obtain health insurance or life insurance coverage, the individuals must also attest that they are financially interdependent and have been in the relationship for at least six months. *See* The Ohio State University Office of Human Resources, Affidavit of Same-Sex Domestic Partnership (For Health Care and Life Insurance Coverages), *available at* http://hr.osu.edu/forms/ben/ssdpaffidavit.pdf (last visited Mar. 29, 2006). Ohio State is currently reviewing these differing sets of requirements. Opposite-sex, married couples are not required to make such statements in order to attain benefits. Hence, the requirements for same-sex partners are more traditional than those for contemporary marriage.

7. The marriage-mimicry model is basic to the scholarship in this area. Authors couch discussions of the problem of domestic violence as "wife abuse" even when they are discussing a broader topic. *See, e.g.*, DOMESTIC VIOLENCE: NO LONGER BEHIND THE CURTAINS 36 (Mark A. Siegel & Nancy R. Jacobs eds., 1983) (focusing on "wife abuse"); LEGAL RESPONSES TO WIFE ASSAULT: CURRENT TRENDS AND EVALUATION (N. Zoe Hilton ed., 1993); Linda L. Ammons, *What's God Got To Do with It? Church and State Collaboration in the Subordination of Women and Domestic Violence*, 51 RUTGERS L. REV. 1207, 1264 (1999) (focusing on abuse of wives); Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 270 (1985) (describing the problem

women who were victims of domestic violence in the 1970s and 1980s through the development of warrantless arrest statutes, the availability of civil protection orders, and the funding of battered women's shelters.[8] In the last two decades, legislatures have extended the law of domestic violence to cover others through a marriage-mimicry model.[9] Under this model, individuals can obtain legal recourse from domestic violence if they are in relationships that look like traditional, heterosexual marriages in that they are characterized by two people who have financial interdependence, share an intimate relationship, live in the same household, and have a long-term commitment to the relationship.

While it is a positive development that the law has expanded the scope of who may obtain legal recourse from domestic violence, the marriage-mimicry model is not necessarily the correct framework, because it was developed without lawmakers asking the fundamental questions of who is most in need of legal recourse and how the law can best provide that recourse. A more functional approach would permit the legal system to *disentangle* privileges and benefits from marital status rather than reflexively *extend* privileges and benefits under a marriage-mimicry model.[10] The reflexive use of a marriage-mimicry model under the law of domestic violence is in

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of wife beating); Bernadette Dunn Sewell, Note, *History of Abuse: Societal, Judicial, and Legislative Responses to the Problem of Wife Beating*, 23 SUFFOLK U. L. REV. 983, 984-97 (1989).

8. *See infra* Part I.

9. The law of domestic violence is generally governed by state law, and the states have a variety of approaches. *See infra* Appendix B (summarizing state laws). The law of domestic violence also protects children and the elderly; those protections are beyond the scope of this Article.

10. It is conventional to argue that the law should promote marriage because it is good for society for individuals to live in stable, monogamous, long-term relationships. *See* Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129, 140 (2003). This argument is made particularly when children are in the home because children are thought to benefit from living in a two-parent household. *See id.* Undoubtedly, society benefits from loving, long-term relationships and from raising children in such households. Nonetheless, this Article argues that society overprivileges marriage so that individuals are induced to join or stay in the institution of marriage even when the relationship is harmful to the individuals themselves and is not benefitting society. The law of domestic violence reflects this overprotection. The state should seek to protect individuals from domestic violence when they face a real threat of abuse in their homes; individuals should not have to demonstrate a marriage-like status to receive such protection. Given the overprivileging of marriage in our society, little risk exists that acceptance of this Article's primary thesis would result in the underprotection of marriage and a decline in the positive benefits of marriage on our society.

sharp contrast to the use of other categories in our legal system. We no longer allow the state to use race, gender, national origin, or religion as a proxy for who should receive privileges and benefits. A more functional approach would constitute a fairer and more efficient use of the states' financial resources.

The law of domestic violence is not unique in employing a model that privileges marriage. A General Accounting Office (GAO) report has documented that the federal government conditions *1049* federal benefits on an individual's marital status.[11] The marriage-mimicry model conditions a subset of such privileges or benefits on an individual's marriage-like status when the individual is not actually married. The recent recognition of same-sex marriage or domestic partnerships at the state level has followed the marriage-mimicry model.[12] The availability of same-sex marriage or domestic partnerships reinforces the notion that certain individuals in our society should receive special privileges and benefits because of their marriage-like status, leaving other individuals with little political recourse to attain such privileges and benefits.[13] Some courts have recognized that the denial of privileges and benefits to certain individuals because of their gender or sexual orientation violates the principle of equal protection.[14] They have readily endorsed a marriage extension remedy without considering whether the proper remedy is to disentangle marital status from privileges and benefits.

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11. *See* Letter from Brian R. Bedrick to Henry J. Hyde, *supra* note 5, at 2.

12. *See, e.g.*, VT. STAT. ANN. tit. 15, § 1202 (2000) (Vermont same-sex civil unions); 2005 Conn. Acts 05-10 (Reg. Sess.) (Connecticut same-sex civil unions). In both Vermont and Connecticut, civil unions are available only to same-sex couples and provide the same state-provided benefits to members of civil unions as opposite-sex married couples. Opposite-sex partners can only attain these benefits through marriage; same-sex partners can only attain these benefits through civil unions. These developments therefore follow a marriage-mimicry model rather than a disentanglement model.

13. Queer theorists have argued that the extension of marriage to same-sex couples reinforces the marriage norms of society; but queer theorists are also libertarian in that they argue against state intervention into intimate relationships. *See, e.g.*, Polikoff, *Making Marriage Matter Less*, *supra* note 1, at 366 ("I support the abolition of marriage as a legal category; its religious or cultural status could continue for those who so choose.").

14. *See* Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2004). *See generally* SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE (Robert M. Baird & Stuart E. Rosenbaum eds., 1997).

The Feminist movement, liberalism, the law and order movement, the religious Right, and, most recently, the gay rights movement have contributed to this marriage-mimicry model within the law of domestic violence and marriage. The feminist movement has sought to make marriage a better and safer place for women through state intervention when men have committed rape or domestic violence against women.[15] Liberals have supported no-fault divorce and simpler alimony laws that would both improve the institution of marriage and minimize the state's role in individuals' private lives.[16] Meanwhile, the religious Right has sought to infuse state-recognized marriage with its moral perspective through covenant marriage[17]

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15. *See generally* SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 375-404 (1975); LENORE E. WALKER, THE BATTERED WOMAN 205-21 (1979). At the time, this was called the "battered women's movement"; today it has been transformed into the gender-neutral "domestic violence" movement. For an excellent historical discussion of the law of violence against women, see generally Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996). Some historians have argued that the Feminist movement belatedly embraced the problem of violence against women but all agree that this issue became a priority of the second wave of feminism in the 1970s and 1980s. *See* LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE—BOSTON, 1880-1960, at 254-57 (1988); SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 53-79 (1982); ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 182-88 (2000). For a discussion of the evolution of the marital rape exemption, see Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1382-427 (2000).

16. For an excellent discussion of the transformation of family law in the last several decades, and its increasing emphasis on noninterference, see generally Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985). While liberals did not strenuously push for domestic violence legislation during the Carter administration, *see* Sewell, *supra* note 7, at 998-1002, they did support the Violence Against Women Act of 1994 (VAWA), Pub. L. No. 103-322, 108 Stat. 1796 (Sept. 13, 1994), during the Clinton administration. *See generally* Sarah F. Russell, *Covering Women and Violence: Media Treatment of VAWA's Civil Rights Remedy*, 9 MICH. J. GENDER & L. 327 (2003) (summarizing press coverage of VAWA and the ensuing litigation). Nonetheless, the Supreme Court ultimately found VAWA unconstitutional because it constituted too much regulation of the private sector by the federal government. *See* United States v. Morrison, 529 U.S. 598, 626-27 (2000). VAWA was arguably struck down under classic liberal principles of overinterference with the private sector. For a discussion of the relationship between liberalism and marriage, see generally Robin West, *Universalism, Liberal Theory, and the Problem of Gay Marriage*, 25 FLA. ST. U. L. REV. 705 (1998).

17. Under covenant marriage law, parties may not obtain a divorce without consideration of fault. *See* ARIZ. REV. STAT. ANN. § 25-901 (2000); ARK. CODE ANN. § 9-11-808 (2002); LA. REV. STAT. ANN. § 9:307 (2000 & Supp. 2005); Chauncy E. Brummer, *The Shackles of Covenant Marriage: Who Holds the Key to Wedlock?*, 25 U. ARK. LITTLE ROCK L. REV. 261, 271 (2003).

and bans on same-sex marriage.[18] The law and order movement has sought mandatory arrests for perpetrators of domestic violence and enhanced penalties for those who fail to pay child support in order to improve the institution of marriage.[19] The gay rights movement has sought to make marriage available to same-sex couples thereby making the institution a fairer and more equitable institution.[20]

The result of these varied efforts has been the development of a law of marriage and domestic violence that does not consistently reflect the perspective of any of these political movements. Feminists have succeeded in getting each state to provide legal recourse to married women who are victims of domestic violence but the liberalization of the law of child custody and alimony has often placed married women in a more precarious position than before the advent of the second wave of feminism, making it harder for them to be able to afford to leave abusive relationships.[21] Liberals have succeeded in getting the state to intrude less into the private sphere through invalidation of abortion and sodomy statutes as well as the creation of no-fault divorce but they have also seen an increase in state regulation of the private sphere through the law of marital rape and domestic violence.[22] The law and order movement has

18. *See infra* Appendix B (listing states with same-sex marriage bans). For an attack on same-sex marriage, see Kenneth W. Starr, Address, *"Divided America" and the American Constitutional Tradition*, 3 GEO. J.L. & PUB. POL'Y 1, 2 (2005) (arguing that studies demonstrate that children fare better in households with opposite-sex parents than with same-sex parents). *See generally* Brummer, *supra* note 17. The story of the relationship between religion and society is obviously a very complicated one. Linda Ammons provides extensive documentation of how Judeo-Christian institutions in the United States have been complicit in "promoting the subordination of women and the use of violence as a tool to enforce submission." Ammons, *supra* note 7, at 1210. She extensively discusses various religious doctrines that discourage divorce and encourage women to accept violence within marriage. Nonetheless, she recognizes that "[s]ome religious institutions have begun to alter their formal and informal doctrine so they are not perceived as endorsing domestic violence." *Id.* at 1271. But she also notes that "no identifiable religious organizations on record at the hearings [for the Violence Against Women Act] either supported or opposed this legislation." *Id.* at 1267. Ammons persuasively argues that many religious organizations have insufficiently tried to deal with the problem of violence against women.

19. *See* ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, U.S. DEP'T OF JUSTICE, FINAL REPORT (1984).

20. *See supra* note 12 (discussing Vermont and Connecticut's civil union statutes). *See generally* Jennifer Wriggins, *Marriage Law and Family Law: Autonomy, Interdependence, and Couples of the Same Gender*, 41 B.C. L. REV. 265 (2000).

21. *See* Schneider, *supra* note 16, at 1812-14.

22. *See, e.g.*, Hasday, *supra* note 15, at 1486-90 (describing modern defense of the marital

attained stringent warrantless arrest rules in the domestic violence context but these rules are often underenforced due to the continuing hesitancy of many police officers to intervene into family relations.[23] The religious Right has been able to impose its version of marriage on society through the creation of the option of covenant marriage and bans on same-sex marriage but it has not been able to prevent the state from creating marriage-like models such as domestic partnerships.[24] The gay rights movement has attained more privileges and benefits for same-sex couples, including legal recourse from domestic violence; nonetheless, states have often relegated same-sex couples to the status of a second-class domestic partnership with fewer privileges and benefits than marriage.[25]

Divergent forces operating on one area of the law are nothing new. Law is always a source of compromise. But the piecemeal development of the law of domestic violence has created a patchwork of protections that do not provide adequate legal safeguards to the victims of domestic violence. The result has been a marriage-mimicry model under which states provide individuals with legal recourse from domestic violence if their relationship looks like a marriage, because that model served as the common ground among these four political perspectives. The marriage-mimicry model often leaves individuals underprotected[26] from domestic violence if they

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rape exemption in privacy terms).

23. *See* Sewell, *supra* note 7, at 1006-08 (describing inadequate police response to domestic violence calls).

24. *See generally* Brummer, *supra* note 17.

25. *See* 15 VT. STAT. ANN. tit. 15, §§ 1201, 1204 (2002) (providing parties to a civil union with the same rights that are granted to married couples under state law); 2005 Conn. Acts 05-10 (Reg. Sess.) (enacting a civil union provision for same-sex partners). State law, however, cannot provide same-sex couples with the federal benefits of marriage such as immigration status and tax benefits. As discussed *supra* note 5, federal law provides benefits to married couples in more than one thousand statutory provisions. State civil union laws, unlike state marriage laws, are also typically not valid in other states.

26. Victims of violence who cannot receive the protection of the law of domestic violence do receive protection under the law of stalking and the law of assault and battery. But these other areas of the law provide less stringent penalties than the law of domestic violence. Typically, crimes that are felonies under the law of domestic violence are only misdemeanors under the law of stalking or assault. *See, e.g.*, OHIO REV. CODE ANN. § 2903.211 (West Supp. 2005) (establishing menacing by stalking as a misdemeanor of the first degree); *id.* § 2903.13 (providing that assault is a misdemeanor of the first degree); *id.* § 2919.25 (Supp. 2005) (making domestic violence a felony of the fourth degree for a repeat offender). The law of domestic violence also typically provides easier and enhanced mechanisms for protection

cannot establish that they are married or were married to the alleged abuser or, in some other way, demonstrate that they had an intimate relationship with the alleged abuser or shared the same household. Uncritical acceptance of the marriage-mimicry model has caused policymakers not to ask the functional question of who is in need of domestic violence protection and how the law can best protect those individuals.

This Article consists of three parts. Part I traces the development of the law of domestic violence, discussing how it has developed under the marriage-mimicry model. Part II connects the development of the law of domestic violence to the same-sex marriage movement. It shows how the same-sex marriage movement has contributed to the marriage-mimicry model. Part III argues for a marriage-disentanglement model rather than a marriage-mimicry model in response to equal protection challenges to the law of marriage and domestic violence. Part IV concludes this argument.

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orders than these other areas of the law. *See, e.g.*, *id.* § 2903.213 (Supp. 2005) (granting protection order as a pretrial condition of release, with different rules applying when the person is a family or household member). *See generally* Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL'Y REV. 93 (2005) (contrasting domestic violence civil protection orders from other types of protection orders). The precise differences between the law of domestic violence and the law of stalking or assault is beyond the scope of this Article. The law of domestic violence continues to be used by victims of domestic violence because it provides greater remedies than would otherwise be available for a crime by a nonhousehold member. Hence, I describe the victims of violence as "underprotected" rather than "unprotected." The law of domestic violence is different than other areas of the law that privilege marriage because individuals who do not attain protection under the law of domestic violence do have recourse under other areas of the law. Protection exists on a continuum. By contrast, individuals who do not get state-accorded benefits such as health insurance because they do not meet a definition of marriage or domestic partnership typically receive no benefits at all from the state. Thus, although the law of domestic violence is an example of the privileging of marriage, the consequences of that privileging are less stark than for other areas of the law where benefits do not exist on a continuum.

I. THE LAW OF DOMESTIC VIOLENCE

A. Historical Developments

Historically, society tolerated men beating their wives,[27] but the situation is quite different today. Every state offers some remedy for domestic violence within marriage and most states cover certain individuals who face domestic abuse outside of marriage.[28] The law of domestic violence originated in the United States by virtue of a combination of statutory law and court decision. In 1871, "both Alabama and Massachusetts judicially abrogated a husband's right to physically abuse his wife."[29] Maryland enacted the first statutory law in the United States to prohibit "wife beating" in 1882. The penalty was forty lashes or a year in jail.[30] Broad-ranging legal recourse for victims of domestic violence did not begin until the 1980s, in part due to efforts on behalf of the battered women's movement of the 1970s. It took more than a decade of activism before the federal government began to fund programs for the victims of domestic violence and the states began to adopt protective measures.[31] One objection to these measures was that they would violate the sanctity of the American family.[32]

Many obstacles had to be overcome for the law to recognize the problem of domestic violence.[33] Before the 1980s, law enforcement officials and the courts typically refused to respond to the problem

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27. Under British law of the "rule of the thumb," a man could reportedly beat his wife with a "rod not thicker than his thumb." This rule was reflective of the historical toleration of wife battery. *See* U.S. COMM'N ON CIVIL RIGHTS, UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE 2 (1982).

28. *See* Carla M. da Luz, *A Legal and Social Comparison of Heterosexual and Same-Sex Domestic Violence: Similar Inadequacies in Legal Recognition and Response*, 4 S. CAL. REV. L. & WOMEN'S STUD. 251, 274-76 (1994).

29. Sewell, *supra* note 7, at 992.

30. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 27, at 2. Three states—Maryland, Delaware, and Oregon—enacted legislation authorizing whipping of abusive husbands whereas nine states—California, Illinois, Missouri, Massachusetts, New Hampshire, New Jersey, New York, Pennsylania, and Virginia—considered but rejected such legislation. Sewell, *supra* note 7, at 993 n.77.

31. *See* Sewell, *supra* note 7, at 1000.

32. *Id.* at 999.

33. For an excellent overview of the problems confronting battered women, see generally *Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498 (1993).

of domestic violence.[34] In addition, few battered women's shelters existed, with many of the existing shelters sponsored by religious organizations that "extolled family unity and legitimated male dominance."[35] The women's movement began to open its own shelters in the 1970s in cities such as Pittsburgh, Harrisburg, Boston, and San Francisco.[36] Legal task forces also began to recommend state legislation "that would provide temporary injunctive relief, protection orders, and custody and property determinations for women who had not filed for divorce; would allow women to sue their husbands for damages; would require police training and statistics gathering; and would declare spouse beating a specific crime."[37] The recommended measures were a combination of civil and criminal measures—giving women (who were understood to be the typical victims) the opportunity to seek protection orders to prevent abuse as well as giving the state the opportunity to imprison the perpetrators of domestic violence. Liberals did not make domestic violence a priority in the 1970s; the first two federal efforts to provide enhanced protection for victims of domestic violence in 1978 and 1979 were unsuccessful.[38]

The religious Right helped to derail the Carter administration's efforts to provide federal funding for women's shelters to combat domestic violence. One commentator argued at the time that opposition to federal domestic violence legislation was fueled by the religious Right seeking to test its political influence.[39] Senator Gordon J. Humphrey, a Republican from New Hampshire, called the measures "intrusive and disingenuous,"[40] arguing that the shelters for battered women were "opposed to traditional families."[41] He said

34. When one woman, for example, told the judge that her husband had previously beaten her, the judge responded: "Well, it sounds like you must enjoy getting beaten up if it has happened before. There's nothing I can do." SCHECHTER, *supra* note 15, at 55.

35. *Id.*

36. *Id.* at 56-57.

37. *Id.* at 71.

38. Susan Schechter describes the inability of the women's movement to get federal funding for shelters during the Carter administration. *See id.* at 136-50. For a discussion of the successful attempt to enact legislation in 1984, see *Developments in the Law—Legal Responses to Domestic Violence*, *supra* note 33, at 1543.

39. *See* Sewell, *supra* note 7, at 1000 n.123.

40. Laura B. Weiss, *Senate Passes Domestic Violence Bill, 46-41*, 38 CONG. Q. 2718 (1980).

41. *Id.*

that "an army of social workers will not insure domestic tranquility" and that "[m]orality is not susceptible to bureaucratization."[42] A lobbyist for the "Moral Majority" said that the measure would aid "radical feminists" who will be "coming to the federal trough for a $65 million feed."[43] In addition, "Southern church leaders argued that the legislation prevented parents from spanking children and called upon their members to urge Senate opposition."[44]

Nonetheless, the effort to create a criminal law response to the problem of domestic violence was successful several years later during the Reagan administration. The federal government supported the shelter movement as well as enhanced criminal penalties for the perpetrators of domestic violence. Based on a landmark study in Minneapolis in 1984,[45] the United States Attorney General's Task Force on Family Violence issued a report that recommended that states should enact laws to require warrantless arrests for misdemeanor offenses involving family violence.[46] This report recommended that states "[p]resume that arrest, consistent with state law, is the appropriate response in situations involving serious injury to the victim, use or threatened use of a weapon, violation of a protection order, or other imminent danger to the victim."[47] The report also favored the creation of a wide array of victim assistance programs.[48] Women's rights organizations pushed for warrantless arrests although they were

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42. *Id.*

43. Laura B. Weiss, *"Moral Majority" Leads Lobby Blitz on Bill*, 38 CONG. Q. 2719 (1980).

44. Sewell, *supra* note 7, at 999 n.116.

45. *See* Lawrence W. Sherman & Richard A. Berk, *The Minneapolis Domestic Violence Experiment*, *in* 2 DOMESTIC VIOLENCE: FROM A PRIVATE MATTER TO A FEDERAL OFFENSE 93 (Patricia G. Barnes ed., 1998).

46. *See* ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, *supra* note 19, at 102. The task force that authored this report was composed of Detroit Police Chief William L. Hart; Missouri Attorney General John Ashcroft; Dr. Ann Burgess, Van Ameringen Professor of Nursing at the University of Pennsylvania; Marise Rene Duff, special assistant to the Director of the National Institute of Justice; Suffolk County District Attorney Newman Flanagan; Ursula Meese, executive director of the William Moss Institute on family life and life in the future; Catherine Milton, assistant to the president of Stanford University; Dr. Clyde Narramore, licensed psychologist and family and marriage counselor; Phoenix Police Chief Ruben Ortega, and Frances Seward, former director of the Jamaica Services Program for Older Adults and secretary of the Victims of Crime Advocacy League. *See id.* at 152-55.

47. *Id.* at 17-18; *see also id.* at 22-25 (providing further discussion of the arrest remedy).

48. *Id.* at 46-61. Absent from this list, however, is a recommendation that the federal government fund these efforts.

sometimes ambivalent about mandatory language such as that in the Attorney General's recommendation.[49] They were fearful that poor and minority men would be the disproportionate targets of such legislation.[50] While the support of these criminal law measures by the feminist community varied,[51] feminists uniformly supported the funding of battered women's shelters.[52] Ultimately, support of domestic violence criminal legislation became a mainstream "law and order" cause supported by the International Association of Chiefs of Police and the National Football League Players' Association.[53] In addition, states began to enact domestic violence statutes that made it easier for the victims of domestic violence to obtain civil protection orders.[54]

These efforts by the Attorney General and women's rights organizations had a dramatic effect on the law of domestic violence.[55] By 1988, forty states had enhanced their criminal law policies with respect to domestic violence.[56] As listed in Appendix A, seven types of measures were enacted: mandatory arrest, primary aggressor language in mandatory arrest statute, warrantless

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49. *See* SCHECHTER, *supra* note 15, at 177-78.

50. *See id.*

51. In Texas, for example, the feminist community strongly supported passage of the Domestic Violence Prevention Act in 1985, which gave law enforcement personnel the ability to make warrantless arrests in cases of domestic violence. *See* Susan A. MacManus & Nikki R. Van Hightower, *Limits of State Constitutional Guarantees: Lessons from Efforts To Implement Domestic Violence Policies*, 49 PUB. ADMIN. REV. 269, 272 (1989).

52. The challenge for feminists within the battered women's movement was that they were often blamed for the underfunding of shelters. When battered women's shelters could not handle the client demand, battered women often viewed the women's movement "like any other bureaucracy" and blamed it for its ineffectiveness. *See* SCHECHTER, *supra* note 15, at 179.

53. *See* Sewell, *supra* note 7, at 999 n.117.

54. "Until the legal reforms of the late 1970's, women could not obtain a restraining order against a violent husband unless they were willing to file for divorce at the same time." JEFFREY FAGAN, THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS 8 (1996) (adapting his presentation at the 1995 conference on criminal justice research and evaluation sponsored by the National Institute of Justice). Fagan went on to note that, by 1980, forty-seven states had passed significant reforms. *Id.* at 9.

55. The Attorney General's suggestions had the most initial influence on internal police department policies. *See* Lawrence W. Sherman, *The Influence of Criminology on Criminal Law: Evaluating Arrests for Misdemeanor Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 1, 23 (1992) (finding that, by 1989, eighty-four percent of big-city police agencies had adopted policies preferring arrest in domestic violence cases). Today, all states have statutes allowing warrantless arrest. *See infra* Appendix B.

56. For a summary of state policies in 1988, see *infra* Appendix A.

arrest, mandatory arrest for restraining order violation, requirement that spousal abuse be considered in custody determinations, mandatory police training, and mandatory statewide data collection. The states without enhanced enforcement policies included Alabama, Arkansas, Indiana, Kansas, Maryland, Mississippi, New Mexico, Oklahoma, South Carolina, and Tennessee.[57] Today, every state has a mechanism to obtain a civil protection order and every state provides special criminal sanctions for perpetrators of domestic violence through warrantless arrests or enhanced penalties for perpetrators of domestic violence.[58]

The domestic violence statutes enacted in the 1980s followed a marital model of identifying which victims should be protected through the availability of shelters, civil protection orders, or criminal law enforcement. States provided legal recourse to married couples; some states also provided legal recourse to unmarried opposite-sex couples, especially if they had children or if they were living in a spouse-like relationship. The Wisconsin statute, which often served as the model for other states, provided legal recourse to persons in a "marital relationship or [two] persons of the opposite sex who share one place of abode with minor children and live together in a relationship which is similar to a marital relationship, except that the [two] persons are not married to each other."[59] Washington's statute covered "a person who is married or who is cohabiting with a person as husband and wife at the present time or at some time in the past."[60] Similarly, Missouri covered "spouses,

57. *See infra* Appendix A. MacManus and Van Hightower observe that there is no relationship between a state's enactment of an equal rights amendment and its enactment of enhanced domestic violence protections for battered women. *See* MacManus & Van Hightower, *supra* note 51, at 275-76. This conclusion is not quite as surprising as they might suggest when one considers that the feminist community was divided over the appropriateness of criminal law sanctions in the domestic violence arena. *See* SCHECHTER, *supra* note 15, at 177-83 (discussing challenges of working within the criminal law system to help battered women).

58. *See infra* Appendix B.

59. WIS. STAT. § 46.95(c) (1979), *available at* http://www.legis.state.wi.us/statutes/1979/79stat0046.pdf. Today, the Wisconsin statute gives "household members" protection under domestic violence law. *See* WIS. STAT. ANN. § 46.95 (West 2003). This term is defined as "a person currently or formerly residing in a place of abode with another person." *Id.* § 46.95(1)(c).

60. WASH. REV. CODE ANN. § 10.99.020(1) (West 1980). Today, the Washington statute defines family or household members as including "adult persons who are presently residing

persons related by blood or marriage, and other persons of the opposite sex jointly residing in the same dwelling unit."[61] Each of these approaches reflected a marital model, providing legal recourse to opposite-sex couples who were eligible to marry under state law, sometimes providing enhanced protection if they were raising children together.

Given the context of the enactment of domestic violence legislation—against a backdrop of being accused of violating the sanctity of the family and marriage[62]—it is not surprising that most attention was given to marriage-like relationships during this wave of statutory enactment in the 1980s. Also, it is important to remember that the domestic violence movement was historically a *women's* movement to protect women from male domination. Little thought was given to the problem of same-sex violence perpetrated by men or women.[63] It was considered progressive to provide legal recourse to heterosexual women in unmarried relationships with

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together or who have resided together in the past" as well as persons in a "dating relationship." WASH. REV. CODE ANN. § 10.99.020(1) (West 2002).

61. MO. ANN. STAT. §§ 455.010(b), .020 (Vernon Supp. 1981). Today, the Missouri statute defines "family or household member" as including "adults who are presently residing together or have resided together in the past" as well as "an adult who is or has been in a continuing social relationship of a romantic or intimate nature with the victim." MO. ANN. STAT. § 455.010(5) (West 2003).

62. Bernadette Dunn Sewell describes the efforts that prevented the passage of federal domestic violence legislation in 1979 and 1980:

> Conservative groups and politicians nationwide rallied to prevent the passage of the proposed legislation. Led by the Moral Majority, they described the bill as an unacceptable federal intrusion into the domestic realm, an attack on the American family, and a means of funding feminist causes. In addition to verbal attacks, the bill's opponents waged a telephone and mail lobbying campaign designed to persuade senators to vote against the conference report. Furthermore, they supported those candidates for national office with conservative voting records, in some cases defeating more liberal incumbents. This swung the votes of many senators previously in favor of the bill, but who now feared opposition by the New Right, thus effectively defeating the measure.

Sewell, *supra* note 7, at 999-1000 (citations omitted).

63. In an important report on the problem of domestic violence authored by the United States Civil Rights Commission in 1982, the authors describe their charge to investigate "the battering of women by men with whom they have or have had an intimate relationship, whether or not legally married." U.S. COMM'N ON CIVIL RIGHTS, *supra* note 27, at v. At the time the report was written, the problem was called "wife battering." Today, the problem is called "domestic violence" to describe it in more gender-neutral terms. As part of this transition of understanding the problem in gender-neutral terms, some people have come to understand it as including same-sex violence.

men. But legal recourse was typically only extended to women in marriage-like relationships characterized by a shared household, long-term relationship, sexually intimate relations, and children.[64]

In sum, all the states substantially expanded their laws on domestic violence during the 1970s and 1980s. These reforms tended to include criminal punishment and the availability of civil protection orders.[65] These reforms also tended to occur in a piecemeal fashion, starting with a marital model and then extending to others who looked like they were in a marriage-like relationship. As we will see below, that approach leaves some individuals who may be victims of domestic violence underprotected.

B. Domestic Violence Protection Today

Today, all states prohibit domestic violence. States enforce these rules through enhanced criminal law penalties as well as civil protection orders. Nonetheless, states do not always use the same definition of who is protected in the criminal and civil context because of the piecemeal way that they have enacted domestic violence laws.[66] States fall into five categories with respect to the coverage of the adult victims of domestic violence. As reflected in

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64. *See supra* notes 59-61 and accompanying text (citing representative statutes).

65. One criticism of these reforms is that, aside from consideration of the Minneapolis study, none of these reforms were based on empirical research demonstrating their effectiveness. *See* FAGAN, *supra* note 54. This Article does not seek to enter the debate about which types of legal measures are most effective in dealing with the problem of domestic violence. Instead, this Article argues that whatever legal approaches are used should protect those who are likely to be victims of domestic violence. The piecemeal, marriage-mimicry model has left some individuals outside the scope of protection. This Article also does not discuss the enforcement problems that may exist in the law of domestic violence. Some studies suggest that the enforcement mechanisms are strongly related to the effectiveness of the law of domestic violence. Unenforced protection orders, for example, "can prove harmful to victims by creating a false sense of security." *See* OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, ENFORCEMENT OF PROTECTIVE ORDERS, LEGAL SERIES BULL., Jan. 2002, at 5, *available at* http://www.ojp.usdoj.gov/ovc/publications/bulletins/legalseries/bulletin4/ncj189190.pdf.

66. Because the civil and criminal codes are typically codified in different sections of a state's statutes, it is not clear that the difference in coverage is deliberate. Appendix B documents which states use more than one definition of who is protected under their law of domestic violence. Some states, such as Alabama and Delaware, provide broader protection under the criminal law than the civil law, and others, such as Colorado, Hawaii, Idaho, Indiana, Kansas, Louisiana, Maryland, Nebraska, New York, North Carolina, and Wisconsin, provide broader protection under civil law than criminal law. *See infra* Appendix B.

Appendix B, the state laws (1) only cover individuals in opposite-sex relationships, (2) cover individuals in a "dating relationship," (3) cover individuals who live in the same household, (4) explicitly cover same-sex relationships, or (5) have enacted a same-sex marriage ban that might preclude application of domestic violence law to same-sex partners.

Four states (Delaware, Louisiana, North Carolina, and South Carolina) are in the first category; they have chosen explicitly to provide legal recourse *only* to opposite-sex or married partners.[67] In addition, Montana covers household members as well as opposite-sex persons who are *dating*.[68] A 1993 amendment to the Montana code served to *narrow* the scope of who was covered under Montana law by defining partners to include only opposite-sex relationships.[69]

Courts have interpreted state statutes to include an opposite-sex requirement even when the statute does not contain such an explicit requirement. As recently as 1994, for example, the California courts interpreted the "cohabiting" requirement in the spousal abuse criminal law statute to require the individuals to be "an unrelated man and woman living together in a substantial relationship—one manifested, minimally, by permanence and sexual or amorous intimacy."[70] This restriction to opposite-sex couples survived an

67. Delaware protects spouses, "[f]ormer spouses [and] a man and a woman co-habiting together with or without a child of either or both, or a man and a woman living separate and apart with a child in common." DEL. CODE ANN. tit. 10, § 1041(2)(b) (1999). Louisiana only protects "spouses" or "opposite sex" couples who presently or formerly lived in the same household. LA. REV. STAT. ANN. § 46:2132(4) (Supp. 2005). Lesser protection is provided to "[a] victim of a dating partner," which includes "any person who is or has been in a social relationship of a romantic or intimate nature with the victim." *Id.* § 46:2151(B). North Carolina covers "persons of the opposite sex who are in a dating relationship or have been in a dating relationship." N.C. GEN. STAT. § 50B-1(b)(6) (2003). A "dating relationship" is defined as a relationship "wherein the parties are romantically involved over time and on a continuous basis during the course of the relationship. A casual acquaintance or ordinary fraternization between persons in a business or social context is not a dating relationship." *Id.* South Carolina protects "spouses, former spouses, ... persons who have a child in common, and a male and female who are cohabiting or formerly have cohabited." S.C. CODE ANN. § 16-25-10 (2003).

68. MONT. CODE ANN. § 45-5-206(2)(b) (2005).

69. *See* MONT. CODE ANN. § 45-5-206, Compiler's Cmts. at 264 (2005).

70. People v. Silva, 33 Cal. Rptr. 2d 181, 184 n.6 (Ct. App. 1994).

equal protection challenge,[71] although it appears that the rule no longer applies only to opposite-sex couples.[72]

Some states do not limit coverage to opposite-sex couples but, instead, cover those in a "spouse-like" relationship. Indiana's criminal code, for example, provides legal recourse to those who are "similarly situated to a spouse."[73] Ohio, Pennsylvania, and West Virginia laws cover those who are "living as a spouse."[74] With states increasingly enacting same-sex marriage bans,[75] it is not clear whether these "living as a spouse" rules preclude coverage of same-sex couples. They do certainly reflect the marriage-mimicry model underlying domestic violence legislation.

All states provide legal recourse to married individuals who are victims of domestic violence. In addition, they typically cover other individuals under a marriage-mimicry model. States in category two inquire into whether the couple has a sexual or intimate or dating relationship. These "dating relationships" must usually be of a long-term nature. Massachusetts covers those in a "substantive dating or engagement relationship" as determined by a court.[76] New Mexico covers a "person with whom the petitioner has had a continuing personal relationship."[77] North Carolina covers those in a "dating relationship" wherein "the parties are romantically involved over time and on a continuous basis during the course of the relationship."[78] Most of the other states provide coverage to individuals in a long-term, dating relationship as well as individuals who cohabit together.[79]

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71. *Id.* at 187.

72. The domestic violence statute has been used to provide a protection order to a woman against a woman who she publicly "married." *See* Annette F. v. Sharon S., 15 Cal. Rptr. 3d 100, 104-06 (Ct. App. 2004) (noting that Sharon obtained a three-year restraining order against Annette). Nonetheless, California law does require a "romantic or friendly" relationship in order for the domestic violence statute to apply. *See* O'Kane v. Irvine, 54 Cal. Rptr. 2d 549, 550 (Ct. App. 1996) (holding that the domestic violence statute does not apply to a woman who is allegedly abused by a man who, like herself, sublets a bedroom in a house).

73. IND. CODE ANN. § 35-41-1-6.3 (LexisNexis 2004).

74. OHIO REV. CODE ANN. § 3113.31(A)(3)-(4) (West 2000); 23 PA. CONS. STAT. ANN. § 6102(1) (West 2001 & Supp. 2005); W. VA. CODE ANN. § 48-27-204 (LexisNexis 2004).

75. Appendix B lists the states that have a same-sex marriage ban under statutory law or state constitutional law. *See infra* Appendix B.

76. MASS. GEN. LAWS ANN. ch. 209A, § 1 (West 1998).

77. N.M. STAT. ANN. § 40-13-2(D) (West 2003).

78. N.C. GEN. STAT. ANN. § 50B-1(b)(6) (West 2003).

79. *See infra* Appendix B (listing Alaska, California, Colorado, Connecticut, D.C., Hawaii,

The problems with the "dating" model can be seen in a District of Columbia case, *Sandoval v. Mendez*.[80] Julia Sandoval testified that she was beaten in her own home by José Mendez, who was the boyfriend of her cousin.[81] She also testified that they had no relationship although they "used to live together."[82] The court ruled that Sandoval was not entitled to a civil protection order because she did not have an intimate relationship with the defendant.[83] Sandoval would appear to be the type of individual who may fall between the cracks under the traditional marital model. She seems to have lived in a Spanish-speaking household with four individuals—herself, her boyfriend, her cousin, and her cousin's boyfriend. When she faced abuse, she testified that she did not know any English so she went to her brother's house to call the police; instead, she found police on the street.[84] Despite her lack of English-speaking ability, she managed to navigate the justice system to seek a civil protection order but was told by the court that she was not eligible for a protection order from the defendant because they did not have an intimate relationship.[85]

The "dating relationship" rule can also fail to cover individuals who went on one "date" but did not have a long-term relationship. For example, Alison C. sought a civil protection order against David Westcott after he took her in a car to a deserted parking lot, "indicated that he had a gun, sat on top of her, and 'touch[ed] [her] breasts and put[] his hands down [her] pants'" while she "repeatedly told him to stop touching her."[86] They were together on that occasion because they were supposed to go to lunch together on a "date."[87]

Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, Washington, West Virginia, Wisconsin, and Wyoming as providing such coverage).

80. 521 A.2d 1168 (D.C. 1987).

81. Sandoval testified that "Mr. Mendez was punching her in the mouth and in the head." *Id.* at 1170.

82. *Id.* at 1171.

83. *Id.*

84. *Id.* at 1170.

85. The District of Columbia uses the same definition under its criminal law, so the district also could not prosecute the defendant for domestic abuse. *See* D.C. CODE § 16-1001(5) (2001).

86. Alison C. v. Westcott, 798 N.E.2d 813, 814 (Ill. App. Ct. 2003) (quoting the plaintiff).

87. *Id.* at 817.

The trial court judge refused to dismiss the petition seeking a civil protection order because the parties were "not engaged in a dating relationship" as required by Illinois law to receive a protection order.[88] On appeal, however, the Illinois court found that one date could not constitute a "dating relationship." "The relationship was brief and not exclusive. Any prospect of a romantic relationship was, in short, quashed at the outset."[89] Because the woman rebuffed David's advances, she could not seek a civil protection order.[90] Like the District of Columbia, Illinois uses the same definition for criminal liability and a civil protection order, so the state could not prosecute Westcott for domestic abuse.[91]

States in category three merely require that the couple has been cohabiting together. The "living together" requirement can also produce problems because courts frequently require a marriage-like long-term relationship to satisfy the cohabitation requirement. For example, Florida requires that the individuals have been "residing together as if a family" for the purposes of a civil protection order or criminal liability.[92] Lois Wright sought a civil protection order against Thaddeus Slovenski after he allegedly committed repeated acts of battery against her.[93] Although Wright testified that she and

88. *Id.*

89. *Id.*

90. The "dating relationship" requirement also proved problematic in a Massachusetts case. The plaintiff's mother sought a protection order on behalf of her fifteen-year-old daughter after she was allegedly forcibly sexually assaulted by her boyfriend. *See* C.O. v. M.M., 815 N.E.2d 582, 585 (Mass. 2004). The mother's testimony that the parties had "go[ne] out" was not sufficient to meet the plaintiff's burden of proving a substantive dating relationship. *Id.* at 588-89.

91. *See* 725 ILL. COMP. STAT. ANN. 5/112A-3 (West Supp. 2005).

92. FLA. STAT. ANN. § 741.28(3) (West 2005) (protective order); *id.* § 741.283 (criminal liability).

93. Slovenski v. Wright, 849 So. 2d 349, 350 (Fla. Dist. Ct. App. 2003). Women in other nonhousehold situations have also been found not to be covered by Florida law. *See* Sharpe v. Sharpe, 695 So. 2d 1302, 1303-04 (Fla. Dist. Ct. App. 1997) (ruling that a widow of the defendant's brother was not able to obtain a domestic violence injunction because she did not reside in the same household as the defendant and was not related by blood or marriage); Evans v. Evans, 599 So. 2d 205, 206 (Fla. Dist. Ct. App. 1992) (holding that a stepmother was not able to obtain a domestic violence injunction because she did not ever live in the same dwelling unit with the defendant). A man was also unable to obtain a domestic violence injunction in Florida because he did not meet the statutory definition of a protected class. *See* Partlowe v. Gomez, 801 So. 2d 968, 969 (Fla. Dist. Ct. App. 2001) (finding that a maternal grandfather and temporary custodian of a child was not eligible to seek an injunction against the child's father after he allegedly threatened plaintiff with violence and poked at his body with his finger while yelling at him in the presence of the child).

Slovenski had a two-year romantic relationship, she was not able to obtain a protection order because the court found the parties had maintained separate residences.[94] The court found that "to establish standing under [the] statute, something more than a romantic relationship with overnight visits is required."[95] The Florida statute has been found to apply to same-sex couples due to a provision that says no one should be denied relief "solely on the basis that such a person is not a spouse."[96] But same-sex couples, like opposite-sex couples, must fit the marital model by living together as a family.[97]

The same household requirement has proven problematic for some women in Connecticut.[98] For example, Raquel James sought a civil protection order against William Wynn after he allegedly held a gun to her head and threatened her life if she left him.[99] The court denied the protection order because Wynn was residing with his wife and four children at the time, although he spent the night and left clothes at the James' home.[100] Connecticut uses the same

94. *Slovenski*, 849 So. 2d at 350.

95. *Id.*

96. Peterman v. Meeker, 855 So. 2d 690, 691 (Fla. Dist. Ct. App. 2003) (quoting FLA. STAT. § 741.30(1)(e) (2002)).

97. *See id.* Similarly, the California civil protection statute has been found not to apply to a woman who alleged that she was abused by a man who, like herself, subletted a bedroom in a house, because they did not have a "romantic or friendly" relationship. O'Kane v. Irvine, 54 Cal. Rptr. 2d 549, 550, 552 (Ct. App. 1996).

98. It has also proven problematic for various alleged victims in New Jersey because the courts have found that the parties had not lived in the same household for a number of years. In each case, the relationship is not one that looks like marriage at all, because it involves family or mere acquaintances. *See, e.g.*, Smith v. Moore, 689 A.2d 145, 147-48 (N.J. Super. Ct. App. Div. 1997) (holding that the state's anti-domestic violence law did not apply when the perpetrator was the former girlfriend of the victim's boyfriend, with whom she only shared the same household during a vacation, despite harassment in the form of obscene phone calls late at night); Sisco v. Sisco, 686 A.2d 792, 793 (N.J Super. Ct. Ch. Div. 1996) (finding no domestic relationship for fifteen years between father and daughter; defendant allegedly "physically assaulted plaintiff, fracturing her nose and causing her to sustain other personal injuries"); Sperling v. Teplitsky, 683 A.2d 244, 245 (N.J. Super. Ct. Ch. Div. 1996) (refusing restraining order when no domestic relationship existed for previous five years although the defendant "kicked a car, then occupied by plaintiff and owned by her live-in boyfriend, at least ten times, resulting in numerous and sundry dents to the vehicle").

99. James v. Wynn, No. FA 980150286, 1999 Conn. Super LEXIS 198, at *1-2 (Super. Ct. Jan. 28, 1999).

100. *Id.* at *3-4. The Connecticut statute was subsequently amended to cover those who are in a "dating relationship." *See* CONN. GEN. STAT. ANN. § 46b-38a (West 2004). That amendment might have produced a different result in the *James* case. The household requirement has also proven problematic for women in Hawaii. In one case, Hawaii sought to prosecute Joshua Puaoi after a police officer observed Puaoi "holding [Darling Phillips]

definition for civil and criminal law purposes, so the state would have faced the same problem if it tried to prosecute Wynn for domestic abuse.[101] The same household requirement has also been problematic for some women in New York. Susan Orellana sought a civil protection order against her former stepfather, Mario Escalante.[102] He had raped her when she was eleven years old and, most recently, had been stalking her.[103] Because her mother had divorced Escalante and she did not live in the same household with him, the court did not have jurisdiction to grant the requested relief.[104] In New York, the criminal law provides an even narrower category of coverage than the civil law. Additional criminal sanctions are only available for those who are "legally married," "formerly married," or who "have a child in common."[105]

The Iowa Supreme Court has adopted a six-factor test (drawn from California case law) to determine whether a couple is cohabiting for the purposes of criminal law enforcement of domestic abuse assault. These factors include

(1) sexual relations between the parties while sharing the same living quarters;
(2) sharing of income or expenses;
(3) joint use or ownership of property;
(4) whether the parties hold themselves out as husband and wife;
(5) the continuity of the relationship; and
(6) the length of the relationship.[106]

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against a tree" and "slap[ing] [her] twice on the left side of the face." State v. Puaoi, 891 P.2d 272, 274 (Haw. 1995). The conviction was reversed because of an absence of evidence that Puaoi and Phillips were family or household members. *Id.* at 272. The Hawaii statute was subsequently amended to include those in a "dating relationship," which may have produced a different result in the *Puaoi* case. *See* HAW. REV. STAT. § 586-1 (Supp. 2004). Similarly, the household requirement has proven problematic for some women in New York. *See* Groves v. State Univ. of N.Y. at Albany, 707 N.Y.S.2d 261, 262-63 (App. Div. 2000) (holding that no protection order was available for a college student after two altercations with Groves because they did not live in the same household).

101. *See* CONN. GEN. STAT. ANN. § 46b-38h (West 2004).

102. Orellana v. Escalante, 653 N.Y.S.2d 992, 992 (App. Div. 1997).

103. *Id.*

104. *Id.* at 993.

105. N.Y. CRIM. PROC. LAW § 530.11 (Consol. 1996); *see also* N.Y. PENAL LAW § 60.12 (Consol. Supp. 2005).

106. State v. Kellogg, 542 N.W.2d 514, 518 (Iowa 1996) (quoting People v. Holifield, 252 Cal. Rptr. 729, 734 (Ct. App. 1988)).

Applying these factors, the Iowa Supreme Court reversed a conviction (based on overly broad jury instructions) involving a fact pattern in which an unmarried man and woman kept living together in separate bedrooms after they ended their sexual relationship.[107] The State charged Francis Kellogg with domestic abuse assault after he kicked Johanna Bunting with spurred boots and hit her.[108] The police reported that Bunting had "bruises, scabs, black eyes, and swelling."[109] Because the judge had given an overly broad jury instruction under which "mere roommates" could obtain statutory protection, the court reversed and remanded for a new trial.[110]

In specifying these six factors, the Iowa Supreme Court noted that these factors fulfill the purpose of protecting "the large number of couples who live as husband and wife without the formal aspect of marriage."[111] These six factors therefore deliberately follow a marriage-mimicry model under which a woman does not receive legal recourse from domestic abuse if she is a "mere roommate" with her alleged abuser, or does not live with her abuser at all. These factors also emphasize financial interdependence, which is not necessarily an aspect of modern relationships.[112]

Other states have adopted these six factors, often in the context of requests for civil protection orders. For example, Laura Wiley sought a civil protection order against Charles Barnett after he allegedly "approached her car, banged on the window, threatened to kill her, and followed her in his vehicle in a reckless manner after she drove away."[113] The Kentucky Supreme Court ruled that Wiley did not come within the group covered by the domestic violence

107. *Id.*

108. *Id.* at 515.

109. *Id.*

110. *Id.* at 518.

111. *Id.*

112. Relying on the case law from many other states, Ohio reduces the cohabitation test to two factors: "financial support and consortium." *See* State v. Yaden, 692 N.E.2d 1097, 1101 (Ohio Ct. App. 1997). The emphasis on financial support is consistent with a traditional definition of marriage in which the parties share finances. It is not consistent with the suggestion of many feminists that women maintain financial independence within marriage. For example, Marjorie Kornhauser has critiqued the traditional definition of marital relationships found in our tax laws. *See generally* Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63 (1993); Marjorie E. Kornhauser, *Theory Versus Reality: The Partnership Model of Marriage in Family and Income Tax Law*, 69 TEMP. L. REV. 1413 (1996).

113. Barnett v. Wiley, 103 S.W.3d 17, 18 (Ky. 2003).

statute because she did not live with her alleged abuser and therefore could not satisfy the statutory "living together" requirement.[114] In justifying its interpretation of Kentucky law, the state supreme court quoted with approval a treatise that explained that the purpose of the domestic violence statute was to "protect victims from harm caused by the persons whose intimate physical relationship to the victim increases the danger of harm, either because the parties live in physical proximity or because the relationship is one whose intimacy may disable the victim from seeking protection."[115] That justification fits the conventional marital model under which we assume that women live with their long-term partners. In this case, however, the lower court found that Barnett and Wiley dated for five years although they never cohabited.[116] Wiley was clearly at risk of violence from Barnett, who apparently was willing to use his automobile as an offensive weapon, but she could not obtain a civil protection order because she had the good sense to not live with him. One can well imagine that Wiley is now afraid to *leave* her home out of fear of Barnett because she had the good sense *not* to ever live with him.

One category of women who are often not covered by states with a cohabitation requirement is pregnant women who do not live with their sexual partners. Nearly every state allows a woman to obtain a civil protection order against a child's father after she has given birth to the child;[117] legal recourse often does not exist against the

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114. *Id.* at 20-21; *see also* KY. REV. STAT. ANN. § 403.720(3) (LexisNexis 1999) (protecting a "member of an unmarried couple who are living together or have formerly lived together").

115. *Barnett*, 103 S.W.2d at 19 (quoting 15 LOUISE E. GRAHAM & JAMES E. KELLER, KENTUCKY PRACTICE: DOMESTIC RELATIONS LAW § 5.1, at 107 (2d ed. 1997)).

116. *See* Brief for Appellee at 4, Barnett v. Wiley, 103 S.W.3d 17 (Ky. 2003) (No. 2002-SC-180-D), 2002 WL 32500639 (citing Order of Franklin Circuit Court, TR 16-17 (first volume)).

117. Most states explicitly cover individuals who have a child in common. *See, e.g.*, ALA. CODE § 30-5-2(a)(4) (LexisNexis 1998) ("child in common"); ALASKA STAT. § 18.66.990(5) (2004) ("persons who have a child of the relationship"); ARIZ. REV. STAT. ANN. § 13-3601.A (3) (2001) ("[t]he victim or the defendant is pregnant by the other party"); ARK. CODE ANN. § 5-26-302 (Supp. 2005) ("child in common"); CAL. PENAL CODE § 243(e)(1) (West 1999) ("a person who is the parent of the defendant's child"); CONN. GEN. STAT. § 46b-38a(2) (2004) ("child in common"); DEL. CODE ANN. tit. 10, § 1041(2) (1999) ("child in common"); FLA. STAT. ANN. § 741.28 (West 2005) ("persons who are parents of a child in common"); GA. CODE ANN. § 19-13-1 (2004) ("persons who are parents of the same child"); HAW. REV. STAT. § 586-1 (Supp. 2004) ("child in common"); IDAHO CODE ANN. § 39-6303(6) (2002) ("child in common"); 725 ILL. COMP. STAT. ANN. 5/112A-3 (West Supp. 2005) ("child in common"); IND. CODE ANN. § 34-6-2-44.8(a) (LexisNexis Supp. 2005) ("child in common"); IOWA CODE § 236.2(2) (Supp. 2005) ("persons

man who impregnated her if she has not yet given birth[118] despite the evidence that women face a heightened risk of abuse when they are pregnant.[119] Only five states offer explicit coverage to women who are pregnant.[120]

Some courts justify narrow interpretation of their domestic violence statutes as necessary to limit the swelling case loads of courts that hear domestic violence cases. For example, a New Jersey court explained its failure to issue a civil protection order to a woman who was receiving harassing phone calls from the former girlfriend of her current boyfriend, with whom she had briefly

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who are parents of the same minor child"). Other states cover those who have been in an "intimate relationship." *See, e.g.*, COLO. REV. STAT. § 13-14-101(2) (2004); N.H. REV. STAT. ANN. § 173-B:1(XV) (LexisNexis 2001); TENN. CODE ANN. § 36-3-601(8) (2001); VT. STAT. ANN. tit. 15, § 1101(2) (2002). In most cases, the existence of a child in common is evidence of an intimate relationship. Two states—Louisiana and Mississippi—appear to provide no protection solely based on the fact that two people have a child in common. Even the states with a "child in common" rule can have victims of domestic violence fall between the cracks. *See, e.g.*, Sowich v. Taurisano, 682 N.Y.S.2d 834 (Fam. Ct. 1998) (holding that a woman was not able to obtain protection order against the biological father of her child because she had relinquished the child for adoption).

118. *See, e.g.*, People v. Ward, 72 Cal. Rptr. 2d 531, 532, 536 (Ct. App. 1998) (finding that a pregnant woman was not able to obtain protection order against the father of her unborn child after he allegedly "grabbed her arms, pushed her down, grabbed her by the hair and slammed her head into the closet door, slapped her, and squeezed her neck"); Gallagher v. Staszewski, No. F95-02495085, 1995 Conn. Super. LEXIS 2371, at *7 (Super. Ct. Aug. 11, 1995) (ruling that a pregnant woman was unable to obtain a protection order because she did not come within the protected class); Gina C. v. Stephen F., 576 N.Y.S.2d 776, 777 (Fam. Ct. 1991) (holding that a pregnant, unmarried woman was not permitted to seek a protection order against the father of her unborn child); *see also* Woodin v. Rasmussen, 455 N.W.2d 535, 536 (Minn. Ct. App. 1990) (holding that a pregnant woman was not able to obtain a protective order against the father of her unborn child who allegedly "threatened her with bodily harm and to kill her"). Under current Minnesota law, Woodin might prevail because the statute includes "persons involved in a significant romantic or sexual relationship." MINN. STAT. ANN. § 518B.01 (West Supp. 2005).

119. *See* Ruth Colker, *Abortion and Violence*, 1 WM. & MARY J. WOMEN & L. 93, 101-04 (1994) (citing statistics that women are at a heightened risk during pregnancy, especially if they are considering an abortion).

120. *See* ARIZ. REV. STAT. ANN. § 13-3601.A.3 (2001) ("[t]he victim or the defendant is pregnant by the other party"); KAN. STAT. ANN. § 21-3412a(c)(1) (Supp. 2004) ("a man and woman if the woman is pregnant and the man is alleged to be the father, regardless of whether they have been married or have lived together at any time"); MINN. STAT. ANN. § 518B.01 (West Supp. 2005); N.J. STAT. ANN. § 2C:25-19d (West 2005) ("any person, regardless of age, who has been subjected to domestic violence by a person with whom the victim has a child in common, or with whom the victim anticipates having a child in common, if one of the parties is pregnant"); UTAH CODE ANN. § 30-6-1 (Supp. 2005) ("is the biological parent of the other party's unborn child").

shared a household, by recounting the "burgeoning domestic violence case-load in the Superior Court," and citing statistics reflecting that the caseload had nearly doubled from 1991 to 1996.[121] This desire to keep the caseload manageable may be causing courts to employ a marriage-mimicry model that will keep out some cases involving individuals who have not been in an intimate, long-term relationship. Hence, the New Jersey court quoted the New Jersey legislature, stating in its findings that it is "the intent of the Legislature to assure the victims of domestic violence the maximum protection from abuse the law can provide," while also citing with approval numerous cases in which the New Jersey courts had failed to find the existence of a covered domestic situation.[122] It described the parties' situation as "jealousy over the affections of a young man, a scenario doubtless as old as recorded time ... and surely not within the contemplation of the Legislature."[123] The evidence in this case reflected harassing phone calls at 12:15 a.m., during which the defendant allegedly called the victim a "slut" and told her to "fuck off."[124] The court's reasoning suggested that state law would also not cover the victim if the defendant came to her house to engage in this harassing behavior.[125] One can well understand why the victim may have wanted a civil protection order to avoid this next step. Was the court stereotypically assuming that a woman would never escalate her anger against another woman to a more violent confrontation?

The law of domestic violence has changed dramatically in the past century. Initially, the law of domestic violence was needed to respond to the problem that a married woman had no legal recourse if her husband beat her. The law prohibited such battery outside of marriage.[126] A woman needed the law of domestic violence to give her the same legal recourse within the domestic sphere of marriage. Over time, however, the law of domestic violence has gone beyond the "leveling the playing field" rationale. Today, the law of domestic violence provides *enhanced* legal recourse to victims of assault within the domestic sphere as compared with assault outside the

121. Smith v. Moore, 689 A.2d 145, 146, 147 n.3 (N.J. Super. App. Div. 1997).
122. *Id.* at 148; *see also id.* at 147 (citing other New Jersey cases).
123. *Id.* at 148.
124. *Id.* at 146.
125. *See id.* at 147-48.
126. *See supra* note 27 and accompanying text.

domestic sphere through a system of civil protection orders, warrantless arrest, and enhanced criminal penalties.[127] Further, the law of domestic violence has expanded its scope of coverage to include more than married women; it typically covers all individuals in long-term intimate relationships who face violence in their households from their partners.[128] Yet, those individuals were not historically exempted from the law of assault and battery if they were unmarried. The "leveling the playing field" rationale would not explain the extension of the law of domestic violence to those individuals.

So what is the current theory underlying the law of domestic violence? Is it a law of *intimate* violence, designed to provide legal recourse to those who may face battery from an intimate partner? Under that theory, one might argue that battery by an intimate partner is more harmful than battery from others, because of the violation of trust that occurs in the context of battery by an intimate partner. Or is it a law of *household* violence, designed to provide legal recourse to those who may face battery in their home? Under that theory, one might argue that individuals particularly need to feel safe in their homes so special legal protections are appropriate to safeguard the home.

If the law of domestic violence is a law of *intimate* violence, then it is underprotective because it does not provide legal recourse to a woman who rebuffs a man's advances after one date and does not cover a woman who is battered by an intimate partner who is married to another woman. If the law of domestic violence is a law of *household* violence, then it is underprotective because it does not provide legal recourse to a woman who lives in an apartment or boarding house with a man with whom she is not intimate but who seeks to batter her.

One might respond to these observations by noting that the law can never perfectly provide legal recourse to those in need of protection. The law often uses imperfect proxies to define who gets privileges and benefits. Unless the law reflects an inappropriate bias, we must tolerate such imperfection. But marital status, like race, gender, religion, and national origin, should be the type of

127. *See supra* note 26.

128. *See supra* notes 59-60 and accompanying text.

classification that creates heightened scrutiny, and a corresponding suspicion of inappropriate use as a proxy for other characteristics.[129]

In addition, the marriage-mimicry model reflects a middle-class bias. The middle class is more likely to have long-term marriages.[130] Middle-class people are also more likely to be able to have control over the nature and structure of their households. The cases involving women living in boarding houses or apartment situations represent poor women. Poor women are more at risk of violence in their lives than middle-class women.[131] Yet, the law of domestic violence is structured around a middle-class expectation of control over one's household. If the law of domestic violence reflected a more functional approach, then it might better provide legal recourse for a broader range of women in our society.

II. SAME-SEX MARRIAGE AND THE LAW OF DOMESTIC VIOLENCE

While the domestic violence movement has been engaging in a marriage-mimicry model for defining who is protected under its statutes, the gay rights movement has also been engaging in a marriage-mimicry model to extend the privileges and benefits of marriage to same-sex couples. The problem with the marriage extension strategy is that it simply moves the fault line with respect

129. Admittedly, this is a complicated argument. Marriage is a fundamental right under the Constitution. Hence, the state is not allowed to burden the right to marry. *See* Zablocki v. Redhail, 434 U.S. 374, 390 (1978). But the state is not merely neutral with respect to marriage; it privileges marriage. The federal government, for example, provides 1049 benefits on the basis of marital status. *See supra* note 5. Arguably, some of the privacy cases stand for the proposition that the state cannot privilege marriage, at least in the criminal context. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 447 (1972). If marital status cannot be a proxy for benefits, then each of those programs would have to be reconsidered on a functional basis. At a minimum, heightened rational basis review would require justification of benefits rather than automatic awarding of benefits.

130. *See generally* David J. Fein, *Married and Poor: Basic Characteristics of Economically Disadvantaged Couples in the U.S.* 4 (Supporting Healthy Marriage Evaluation, Working Paper No. SHM-01, 2004), *available at* http://www.mdrc.org/publications/393/ workpaper.pdf (finding that people with economic disadvantages are as likely to marry as middle-class people but "their marriages are substantially more unstable").

131. *See* ELEANOR LYON, NAT'L ELECTRONIC NETWORK ON VIOLENCE AGAINST WOMEN, WELFARE AND DOMESTIC VIOLENCE AGAINST WOMEN: LESSONS FROM RESEARCH (2002), http://www.vawnet.org/DomesticViolence/Research/VAWnetDocs/AR_Welfare2.pdf ("[P]oor women experience violence by their partners at higher rates, partly because they have fewer options." (citations omitted)).

to who is left without legal recourse. Same-sex couples who marry can come under the umbrella of statutory coverage, but others who are in nonmarital situations are still left without legal recourse. Further, the people left without legal recourse no longer have the gay rights movement as their ally. They become even more politically powerless. Finally, same-sex couples now often face the same dilemma as opposite-sex couples—they need to embrace the institution of marriage (or domestic partnership) to receive privileges and benefits. Rather than challenge why we tie marriage to privileges and benefits, they accept the marital model as the appropriate model.

A. The Extension Strategy

Gay rights advocates have written many articles and books arguing for[132] (and in some cases against[133]) same-sex marriage.[134] The general argument for same-sex marriage is that same-sex couples should be able to benefit from the emotional, social, and legal consequences of marriages that have long been available to opposite-sex partners.[135] The few courts that have favorably considered these equal protection arguments have ruled that same-sex couples must be permitted to enter the institution of marriage or its equivalent.[136] Rather than question why benefits are tied to marriage, they have adopted the "marriage-extension" remedy.

A secondary problem that also underlies the marriage extension argument is that courts are generally oblivious to the *protections* or

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132. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT (1996); Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567 (1994).

133. *See, e.g.*, Polikoff, *We Will Get What We Ask for*, *supra* note 1, at 1536-37.

134. For a balanced collection of essays, see generally SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE, *supra* note 14.

135. ESKRIDGE, *supra* note 132, at 124. The American Law Institute has endorsed the extension strategy by recommending that separating couples who meet the definition of "domestic partners" receive the same economic benefits and protections as divorcing spouses. *See* AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 6.02-.04 (2002). For a general discussion, see Polikoff, *Making Marriage Matter Less*, *supra* note 1.

136. *See* Baehr v. Lewin, 852 P.2d 44, 59 (Haw. 1993); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003); Baker v. State, 744 A.2d 864, 886 (Vt. 1999).

obligations provided by the law of marriage when they consider the marriage extension argument.[137] Their approach is purely a *benefits* approach.[138] This secondary problem causes the problem of domestic violence to be invisible during the same-sex marriage debate. If courts had focused on the protections provided by the law of marriage, possibly they would have seen why a disentanglement model would be preferable to an extension model.

The Hawaii Supreme Court was the first court to favorably consider the equal protection extension argument by examining what it called the "multiplicity of rights and benefits that are contingent upon [the status of marriage]."[139] The court then proceeded to list fourteen of these rights and benefits.[140] Hidden in the list of fourteen, however, were actually some obligations of marriage: the awarding of child custody and support payments in divorce proceedings, the right to spousal support, the right to file a nonsupport action, and post-divorce rights relating to support and property division.[141] The list, however, did not go so far as to mention the possibility of *violence* within a marital relationship, so there is no mention of the law of rape or battery as it applies to married couples. The Hawaii Supreme Court decision was followed by a report by Hawaii's Commission on Sexual Orientation and the Law.[142] The Commission was charged with examining "the major legal and economic benefits extended to married opposite-sex couples, but not to same-sex couples."[143] In response to this charge, it created an extensive report which focused entirely on benefits and did not even list the obligations noted by the Hawaii Supreme Court.[144] Both the Hawaii Supreme Court and the Hawaii Commission suggested that the solution to this problem of unequal benefits was to create a marriage-like status for same-sex couples.

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137. *See, e.g.*, *Baehr*, 852 P.2d at 59 (listing the "rights and benefits" accorded to married persons under Hawaii law).

138. *See id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. STATE OF HAWAII, REPORT OF THE COMMISSION ON SEXUAL ORIENTATION AND THE LAW (1995), *available at* http://www.hawaii.gov/lrb/rpts95/sol/soldoc.html.

143. *Id.* at 1.

144. *See id.* at app. B.

The needs of the victims of domestic violence were not a concern of the Hawaii Supreme Court or the Hawaii Commission when they considered the unequal status of nonmarried couples. In fact, Hawaii law was, at the time, quite inadequate for the victims of domestic violence because it limited coverage to "spouses and former spouses."[145]

Despite the recommendation of the Hawaii Commission, Hawaii did not make marriage available to same-sex partners because the voters amended the Hawaii Constitution to preclude this possibility.[146] Instead, Hawaii created a "reciprocal beneficiaries" status under which same-sex partners could register with the state and receive the state-sanctioned benefits of marriage[147] as listed in the Hawaii Commission report. Fortunately for the victims of same-sex domestic violence, the Reciprocal Beneficiaries Act did create legal recourse from domestic violence for "reciprocal beneficiaries" and "former reciprocal beneficiaries,"[148] mimicking the marital language in the prior version of Hawaii law.

The Hawaii marital-mimicry solution created a new fault line in the domestic violence arena. It left individuals who were not married or registered domestic partners without legal recourse from domestic violence. The interpretation clause that accompanied this revision directed the courts to interpret this law narrowly.[149] The Hawaii legislature's recognition that same-sex couples did need legal recourse from domestic violence created a new fault line in the marriage debate. With the addition of "reciprocal beneficiaries" to the list of who may obtain legal recourse from domestic violence, the state moved the line of statutory coverage but left unmarried opposite-sex and unregistered same-sex couples without legal recourse.

Hawaii has subsequently supplemented its coverage of domestic violence to include individuals in dating relationships or individuals

145. *See* HAW. REV. STAT. §§ 586-1, 709-906 (1993).

146. HAW. CONST. art. 1, § 23 (amended 1998).

147. Reciprocal Beneficiaries Act, §§ 1-5, 1997 Haw. Sess. Laws 383.

148. *Id.* § 64 (amending HAW. REV. STAT. § 586-1); *id.* § 70 (amending HAW. REV. STAT. § 709-906).

149. The interpretation clause states: "Notwithstanding any other law to the contrary, the rights and benefits extended by this Act shall be narrowly interpreted and nothing in this Act shall be construed nor implied to create or extend rights or benefits not specifically provided herein." *Id.* § 74.

who live together.[150] These rules can cover individuals who are in marriage-like relationships reflected by cohabitation or a significant long-term dating relationship. They were, however, no help to Darling Phillips after a police officer observed that Joshua Puaoi held her against a tree and slapped her twice on the left side of the face because Phillips had the good sense not to have a long-term, cohabitating relationship with Puaoi.[151] Like many other states, Hawaii keeps amending its domestic violence statute to bring more individuals into the marriage-mimicry model without asking who is at risk for domestic violence.

Vermont, Massachusetts, and Nebraska have also favorably considered the equal protection argument in the same-sex marriage context through an equal benefits approach.[152] Vermont considered the "benefits and protections incident to a marriage license" as part of its analysis.[153] Similarly, the Massachusetts Supreme Judicial Court devoted several pages of its landmark same-sex marriage opinion to listing the many tangible and intangible consequences that flow from the law of marriage.[154] Finally, the Nebraska district court favorably considered various arguments that the ban on same-sex marriage violates the United States Constitution.[155] It favorably considered the marriage benefits extension argument.[156]

These states also use the marriage-mimicry model to define who should be covered by the law of domestic violence. The Vermont domestic violence statute requires the accused and the victim to have a "sexual" or "dating" relationship if they are not married.[157] Massachusetts requires the individuals to have a "substantive dating or engagement relationship" if they are not married.[158] Finally, Nebraska requires the individuals to have a "dating

150. *See* HAW. REV. STAT. § 586-1 (Supp. 2004).

151. *See* State v. Puaoi, 891 P.2d 272, 274, 278 (Haw. 1995).

152. *See* Citizens for Equal Prot., Inc. v. Bruning, 368 F. Supp. 2d 980, 997-1000 (D. Neb. 2005); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 954-57 (Mass. 2003); Baker v. State, 744 A.2d 864, 883-84 (Vt. 1999).

153. *Baker*, 744 A.2d at 883-84.

154. *See Goodridge*, 798 N.E.2d at 954-57. At the end of this recitation, the court observed: "[i]t is undoubtedly for these concrete reasons, as well as for its intimately personal significance, that civil marriage has long been termed a 'civil right.'" *Id.* at 957.

155. *Bruning*, 368 F. Supp. 2d at 997-1000, 1005.

156. *Id.* at 997-1000.

157. VT. STAT. ANN. tit. 15, § 1101(2) (2002).

158. MASS. GEN. LAWS ANN. ch. 209A, § 1 (West 1998).

relationship" with each other if they are not married.[159] The law of domestic violence in these states is even narrower than in Hawaii because they do not have the "household member" rule for coverage.[160]

But what if these four courts had not accepted the marriage extension remedy argument? If, instead, they had ruled that a state may not condition any privilege or benefit on marital status, then the presumption of a marriage-like model for domestic violence would also be challenged. Individuals should not have to be married or "dating" in order to receive enhanced legal recourse from domestic violence. A woman might face abuse from a man with whom she is sharing a household although they are not intimate. In fact, she may face abuse *because* she does not want to have an intimate relationship with him. An individual needs legal recourse from abuse through the law of domestic violence if the abuser is likely to threaten the tranquility of the person's residence. If we stop thinking of that problem through a marriage-mimicry lens, then we may be able to define more appropriately who is in need of statutory coverage.

One problem with the marriage-extension remedy is that it causes fiscal conservatives to be hesitant on economic, rather than moral, grounds to extend marriage to same-sex couples.[161] They perceive the same-sex marriage movement as entailing a significant financial cost. But what is lost in this discussion is how the law of marriage, generally, is a very expensive legal development. Recall that a GAO report found that 1049 benefits are conditioned on marriage under federal law.[162] What would happen if we used a

159. NEB. REV. STAT. § 42-903(3) (2005). Married couples are explicitly listed as receiving domestic violence protection, as well as those in a dating relationship or those who reside together. *Id.*

160. *Compare* HAW. REV. STAT. §§ 586-1, 709-906 (Supp. 2004) (extending protection to "persons jointly residing or formerly residing in the same dwelling unit"), *with* MASS. GEN. LAWS ANN. ch. 209A, § 1 (West 1998), NEB. REV. STAT. § 42-903 (2005), *and* VT. STAT. ANN. tit. 15, § 1101 (2002).

161. I can only offer anecdotal evidence in support of this argument. When Ohio was considering its constitutional ban on same-sex marriage, I had discussions with various people who described themselves as fiscal conservatives who told me that they were voting in favor of the same-sex marriage ban to preclude Ohio from spending more money on benefits for couples. If financial benefits were not attached to the institution of marriage, these people suggested they would vote against Ohio's ban on same-sex marriage.

162. *See* Letter from Barry R. Bedrick to Henry J. Hyde, *supra* note 5, at 1-2.

functional approach in thinking through each of these benefits to see if those benefits should really be tied to marriage? A conventional defense of the institution of marriage and its attendant benefits is that marriage promotes positive childrearing.[163] Yet, marital benefits flow to couples who never intend to have children, never have children, or marry late in life so that having children together is not a realistic possibility. And, of course, most of the 1049 federal benefits that are attached to marriage are not available to children who are raised in household arrangements other than marital arrangements. If the nurturing of children is the goal of marital benefits, a functional approach could achieve that goal more efficiently.[164]

B. Same-Sex Marriage Ban and Domestic Violence

Those in same-sex couples in Hawaii, Massachusetts, Vermont, and Nebraska can at least take solace in the fact they have legal recourse from domestic violence if they have a marriage-like relationship with their partner. Individuals in states other than Hawaii that have banned same-sex marriage are in a much worse situation. They are often at risk of not being able to obtain legal recourse if the domestic violence law is limited to individuals in "spouse-like" relationships. That problem is particularly stark in Ohio.[165]

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163. *See* Robert P. George, *What's Sex Got To Do with It? Marriage, Morality, and Rationality*, 49 AM. J. JURIS. 63, 64 (2004) ("'Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve.'" (quoting JAMES Q. WILSON, THE MARRIAGE PROBLEM: HOW CULTURE HAS WEAKENED FAMILIES 41 (2002))).

164. Mechele Dickerson has used a functional approach to ask why federal bankruptcy benefits should be granted based on marital status. *See generally* A. Mechele Dickerson, *Family Values and the Bankruptcy Code: A Proposal To Eliminate Bankruptcy Benefits Awarded on the Basis of Marital Status*, 67 FORDHAM L. REV. 69 (1998). She "argues that Congress should ignore marital status when awarding benefits to debtors in bankruptcy cases." *Id.* at 71.

165. Prior to 2000, Michigan would have faced a similar problem because its domestic violence statute was limited to spouses, former spouses, and intimate heterosexuals. *See* MICH. COMP. LAWS ANN. § 400.1501 (West 1997). But the statute was revised in 2000 to include all persons in a dating or sexual relationship. *See* MICH. COMP. LAWS ANN. § 400.1501 (West Supp. 2005). The state's broad ban on same-sex marriage should have no effect on the law of domestic violence because the law of domestic violence is not tied to the status of marriage. *See id.*

Ohio's law of domestic violence covers a "family or household member."[166] That term is defined to include an individual who is "residing or has resided with" the alleged offender, and who is a "spouse" or a "person living as a spouse."[167] "Person living as a spouse" is defined as a "person who is living or has lived with the offender in a common law marital relationship, who otherwise is cohabiting with the offender, or who otherwise has cohabited with the offender within five years prior to the date of the alleged commission of the act in question."[168] Prior to adoption of the state's ban on same-sex marriage, this statute was interpreted to cover same-sex couples.[169]

The Ohio statute, however, has historically left women who were not in a marriage-like relationship without legal recourse. The state of Ohio sought a domestic violence charge on behalf of Bonita Likely against James E. Cobb.[170] According to the trial testimony, Likely was married to someone else and Cobb maintained his own apartment.[171] Nonetheless, Cobb spent nearly every night at Likely's apartment and kept sleepwear and slippers at her apartment.[172] He had a key to her apartment.[173] Although a witness testified that Cobb pushed his way into Likely's apartment after she told him that she wished to terminate the relationship and assaulted her, the court found that the State could not bring a domestic violence charge because "a reasonable mind could not fairly find that the relationship between Likely and Cobb involved cohabitation [because] [t]here was no evidence of sharing of familial or financial responsibilities. At most, there was a sporadic provision of money and conjugal relations."[174] The fact that Likely was married to another man probably made the court reluctant to conclude that she had a spouse-like relationship with Cobb, despite the fact that they had been dating for fifteen months before the incident.[175]

166. OHIO REV. CODE ANN. § 2919.25 (West Supp. 2005).
167. *Id.* § 2919.25(f).
168. *Id.* § 2919.25(f)(2).
169. *See* State v. Hadinger, 573 N.E.2d 1191, 1193 (Ohio Ct. App. 1991).
170. State v. Cobb, 795 N.E.2d 73, 74 (Ohio Ct. App. 2003).
171. *Id.* at 75.
172. *Id.*
173. *Id.*
174. *Id.* at 75-76.
175. Nonmarried family members who do not "cohabit" are also left unprotected under

The voters of Ohio have heightened the marriage-mimicry model under Ohio law. On November 2, 2004, the voters adopted an amendment to the state constitution. Under this amendment:

> Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.[176]

The question raised by the existence of these two provisions is whether the language in the Ohio Marriage Amendment precluding the state from recognizing any marital-type relationship precludes the application of the law of domestic violence to unmarried couples. Five Ohio courts have considered this issue and have reached conflicting decisions.[177] The problem in Ohio, like the

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Ohio's statute. Sherry and Russell Maglionico filed a petition for a domestic violence civil protection order against Andrew Maglionico, who was Russell's brother. Maglionico v. Maglionico, No. 2000-P-0115, 2001 Ohio LEXIS 8901 at *1 (Ohio Ct. App. Nov. 9, 2001). Although Andrew did not live with Sherry and Russell, they feared domestic violence based on his repeated threats to beat or shoot them. *Id.* at *7. Because there was no evidence that the parties resided together, the domestic violence order was reversed. *Id.* at *11-12.

176. OHIO CONST. art. XV, § 11.

177. *Compare* State v. Ward, No. 05CR0269, slip. op. (Ohio Ct. App. 2006) (holding that the domestic violence statute does violate the Ohio Marriage Amendment), *and* State v. Carswell, No. 05CR22077 (Ohio Ct. C.P. April 12, 2005) (same), *with* State v. Burk, 843 N.E.2d 1254 (Ohio Ct. App. 2005) (holding that the domestic violence statute is constitutional and can coexist with the Ohio Marriage Amendment), *and* State v. Rodgers, 827 N.E.2d 872 (Ohio Ct. C.P. 2005) (same). The most interesting case is *Phelps v. Johnson*, No. DV05 305642 (Ohio Ct. C.P. Nov. 28, 2005), in which Judge James B. Celebrezze concluded that the Ohio Marriage Amendment would preclude application of a domestic violence civil protection order to an individual in a nonmarital relationship. He then concluded that the Marriage Amendment violated the Fourteenth Amendment to the United States Constitution because it could not pass the "rational basis test." He stated:

> It is nearly impossible to divine the purpose for discrimination against unmarried persons, although it is generally accepted that the architects of such referendum ballot issues (across the country) were political operatives like Karl Rove, who sought to guarantee that a certain demographic of voters would turn out in large numbers at the polls to vote in the presidential election. Likewise, the other end of the political spectrum promoted referendum issues that sought to raise the minimum wage. The difference between these political efforts was that the Rove side of it served to seriously confuse and complicate the law as it pertains to protecting the victims of domestic violence. This Court finds that the purpose behind Article XV, Section 11 of the Ohio Constitution does not pass the

problem in Hawaii, is that legal recourse from domestic violence has been historically limited to spouses or those in "spouse-like" relationships. A ban on same-sex marriage, therefore, can have the consequence of leaving same-sex couples without legal recourse and with no way to overcome that obstacle because marriage is not available to them.[178]

The Ohio situation, however, also reflects how political forces have conspired to make it difficult to escape the marriage-mimicry model. Although the religious Right historically opposed the development of the law of domestic violence, today the religious Right supports such measures. When the controversy arose in Ohio about the meaning of the state same-sex marriage ban and the law of domestic violence, the proponents of the same-sex marriage ban indicated that Ohio courts should interpret the law of domestic violence to cover same-sex couples.[179] Despite their fervent opposition to same-sex couples being allowed to *marry*, the religious Right's leaders indicated that same-sex couples should be allowed to benefit from a law that required a *spouse-like* relationship. In other words, marriage mimicry was acceptable even if marriage, itself, was not. The marriage-mimicry model is so strong that it is even receiving some support from the religious Right. The marriage-mimicry model becomes a vehicle to avoid having to permit same-sex couples to actually marry.

Another way to understand the Ohio situation is that the functional approach is beginning to rear its head as a way to wade through a very confusing set of statutory and constitutional provisions. The public now understands that unmarried partners may face domestic violence and that the state has a role in prevent-

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> "rational basis test." Therefore, the second sentence of Article XV, Section 11 of the Ohio Constitution (Issue 1) is in violation of the Fourteenth Amendment to the U.S. Constitution (Equal Protections Clause) as it pertains to the Domestic Violence Act in Ohio Law.

Id.

178. Appendix B notes which states have statutory or constitutional bans on same-sex marriage. The overwhelming majority of states ban same-sex marriage. *See infra* Appendix B.

179. *See* Bruce Cadwallader, *It's Still Domestic Violence: Gay-Marriage Ban Has No Effect on Law, Judge Rules*, COLUMBUS DISPATCH, Mar. 26, 2005, at 01A (quoting Phil Burress, Chairman of the Ohio Campaign to Protect Marriage, as indicating that the organization favors the application of domestic violence laws to same-sex couples).

ing such violence. Thus, a law that requires a "spouse-like" relationship is being contorted to cover individuals who may not marry under state law because the violence they are facing in their personal lives is so unacceptable. The irrationality of the "spouse-like" requirement is so obvious that courts are looking the other way rather than strictly interpreting that requirement.

III. THE DISENTANGLEMENT SOLUTION

The problem with the piecemeal approach to the law of domestic violence under which the state tries to appease all the interested parties—the Feminist movement, the religious Right, law and order conservatives, and the liberal Left—is that we have an inadequate law of domestic violence. Who is in need of the law of domestic violence with its enhanced criminal penalties and availability of civil protection orders, along with shelters and warrantless arrests? How can the law best assist such individuals?

It is impossible to answer the question of who is in need of legal recourse from domestic violence because we have framed the research question through a marriage-mimicry lens in which we presume that the parties have an intimate relationship.[180] For example, one of the leading studies on domestic violence, published in July 2000, examined the "extent, nature, and consequences of *intimate partner* violence."[181] Buried in its findings, however, is evidence that women in nonintimate relationships can be at significant risk of domestic violence. Of 263 female stalking victims, 42.8% reported that their victimization started after their relationship ended.[182] In states with cohabitation or substantial dating requirements, many of these women may not be able to obtain civil protection orders. But the data is insufficient to know how large the gap in the law might be because the survey only inquired about women who had been in "intimate" relationships with their stalkers.

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180. Oddly, the law of *domestic* violence is often a law of *intimate* violence yet no state uses the term "intimate violence" in its law.

181. PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY (2000), *available at* http://www.ncjrs.gov/pdffiles1/nij/181867.pdf.

182. *Id.* at 37.

What about women who never agree to "date" a man at all? Who never cohabitated with a man at all? How frequently might they be "stalked" and desire a protection order? The existing law of domestic violence could protect these women (without the enactment of special antistalking legislation) by not having cohabitation and substantial dating requirements as a prerequisite to a protection order.

Another study entitled "Intimate Partner Violence" also lends support to the notion that women need protection from acquaintances who may not fit the definitions contained in domestic violence statutes.[183] In Table 3, the study put victims and their offenders into four different categories: intimate partners, other relatives, friends/acquaintances, and strangers.[184] The rates of violent victimization from 1993 to 1998 for each of these four categories were: 8.4%, 2.8%, 15.0%, and 12.9%, respectively.[185] The *highest* rate of victimization for women was in the friends /acquaintances category, which the report defines as friend/ex-friend, roommate/boarder, schoolmate, neighbor, someone at work/ customer, or other nonrelative.[186] The report provides no discussion of the nature of this victimization or the steps that might be taken to prevent it. In most states, however, the law of domestic violence would not cover these women because they are not in a significant dating relationship or cohabiting with these perpetrators of violence. Yet, the women know these abusers and might want a protection order against them.

If we would write the law of domestic violence from scratch, we need not get caught up in the question of the status of the relationship of the two individuals. There is reason to believe that fear of a homophobic reaction may cause some individuals in same-sex relationships not to seek legal recourse from domestic violence.[187] If

183. *See* CALLIE MARIE RENNISON & SARAH WELCHANS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE 10 (2000) (Bureau of Justice Statistics, Special Report), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv.pdf.

184. *Id.* at tbl.3.

185. *Id.*

186. *Id.* at 8.

187. *See* Nancy J. Knauer, *Same-Sex Domestic Violence: Claiming a Domestic Sphere While Risking Negative Stereotypes*, 8 TEMP. POL. & CIV. RTS. L. REV. 325, 337 (1999) ("Threats to reveal the true nature of the relationship can provide the abuser with considerable psychological (and economic) leverage because of the perceived costs associated with being gay

they did not have to prove that they were sexually intimate or "dating" their abuser, then they might feel more comfortable coming forward to seek a protection order or seek criminal prosecution.[188] The piecemeal approach to the development of the law of domestic violence, however, has caused the legislatures first to cover married relationships and then to cover other relationships which seem to mimic marriage. But we never stop to ask—why use the marital model at all? As legislatures and courts abandon the marital model, they should also abandon the "like-marriage" model as well. Abandoning the marital model under the law of domestic violence could be a good first step toward abandoning the marital model generally. We need to examine each of the 1049 areas of federal law that privilege marriage and ask who is in need of those protections. Why privilege married couples?

The most likely response to the findings presented in this Article is to continue the piecemeal approach by adding yet new categories of individuals to the list of those who can seek protection orders or criminal charges. This Article has shown that the following people have been left underprotected under their state domestic violence law: (1) women who have gone on a few dates with their abuser but did not enter long-term relationships; (2) women who have maintained separate residences from their abusers; (3) women who have been abused by men who are married to other women; (4) women who sublet a room in a boarding house or an apartment with an abuser; (5) pregnant women who do not live with the abusers who are the fathers of the potential child; and (6) women and men in various family situations that do not include marriage or blood ties, such as a widow of the defendant's brother, stepmother, maternal grandfather, former stepdaughter, former girlfriend, and various college students.

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in a homophobic society.").

188. In the national survey of violence against women, only 1% of surveyed women and 0.8% of surveyed men reported living with a same-sex intimate partner at least once in their lifetimes. *See* TJADEN & THOENNES, *supra* note 181, at 29. The low reported rate of living in an intimate relationship with a person of the same sex provides modest insight into the broader problem of the underreporting of same-sex violence in the gay community. If people will not even admit to having been in a same-sex intimate relationship for the purposes of an anonymous survey, it seems hard to imagine that they would publicly acknowledge themselves as being in an intimate relationship with a person of the same sex for the purpose of taking advantage of the law of domestic violence.

Closing these gaps on a piecemeal basis, however, is not much of a solution because new gaps will simply appear in the future. Further, that solution does not address the fundamental question of why we have a law of domestic violence. This is an under-theorized field without much discussion of why battery in a domestic or intimate sphere should be treated differently than other kinds of battery. In fact, it is not even clear whether we have a law of *intimate* violence or a law of *same-household* violence. The theory underlying the law of domestic violence may be that it is more feasible to create an enhanced set of remedies when the identity of the perpetrator is known. Further, it may be the case that the harm is greater when one has actually known the perpetrator in advance of the battery. If those suppositions are correct, then the law of domestic violence should simply make available its protection orders and system of warrantless arrests whenever the victim alleges that she knows the identity of someone who she has reason to believe may seek to batter her. Whether she knows the perpetrator because she[189] dated him, lived with him, worked with him, met him through a mutual friend, or shared a boarding house with him should not be relevant to whether the law is willing to offer her some legal recourse. The only real question should be the basis of her fear of harm. On the other hand, if we believe the harm is greater when a woman has been *intimate* with her abuser, then the law should reflect that fact. It should not matter if they live together, were intimate over a lengthy period of time, or shared financial resources. Again, the marital model does a poor job of defining who needs legal recourse.

The law of domestic violence has evolved from a system in which men were privileged within marriage to beat their wives to a system where men are penalized more stringently if they beat their wives within marriage rather than if they beat a woman outside the context of marriage. The law is not "neutral" with respect to domestic violence; it now articulates the presumption that domestic violence is worse than other kinds of violence. This evolution in the law has not been accompanied by the development of a theory to explain why we have an enhanced, rather than neutral, law of

189. My use of pronouns reflects the most common domestic violence scenario, but there is no reason for laws to be written in gender-specific terms.

domestic violence. Only when we answer the fundamental question of why domestic violence is worse than comparable violence outside the domestic sphere will we begin to answer the question of how the law should define domestic violence. In the meantime, we have a legal system that reflexively privileges marriage and those in marriage-like relationships without asking who is truly deserving of those privileges.

CONCLUSION

Research on domestic violence has presumed that the marriage-mimicry model is the best way to understand the nature of this problem. Hence, statistics on domestic violence presume the existence of an intimate relationship without asking whether such data collection underreports the nature of the problem.[190] The only lens available through which to see the underinclusiveness of the marital model is the case law interpreting domestic violence statutes. These statutes reflect that the marital model leaves women (and some men) underprotected from domestic violence because they cannot establish that they lived in the same household or were sufficiently intimate with their alleged abusers. More research is needed on domestic violence that can help clarify who are the potential victims of such violence, as well as what aspects of the law of domestic violence are the most effective.

The domestic violence and the same-sex marriage movement have both fueled the marriage-mimicry model of law reform. Courts and legislatures can continue to recognize the equal protection problems inherent in our current system of law while not embracing the marriage-mimicry model of law reform. Instead, we should seek to disentangle privileges and benefits from marital status. Such a regime would truly represent fairness to all and help alleviate a patriarchal regime of compulsory heterosexuality.

This Article has focused on the law of domestic violence to show the limitations of the marriage-mimicry model for defining who should be protected. It has taken three decades for the law to begin to cover individuals outside the traditional context of marriage, and

190. *See, e.g.*, Marianne W. Zawitz, *Domestic Violence: Violence Between Intimates*, *in* 1 DOMESTIC VIOLENCE: FROM A PRIVATE MATTER TO A FEDERAL OFFENSE, *supra* note 45, at 1.

many states still have huge holes in their statutory coverage. But, at least the law of domestic violence has developed over the last thirty years to broaden its umbrella of coverage. In that sense, it has been the exception to the rule. Most areas of federal law still use a pure marriage model—not even a marriage-mimicry model—to define who receives privileges and benefits in the areas of taxation, inheritance, and immigration.[191] A strong movement exists in the United States to make marriage available to same-sex partners. Even if this movement is successful, however, many individuals will still fall outside the walls of privileges and benefits because they do not choose to enter the institution of marriage.[192] Only the disentanglement solution will benefit those individuals.

It is possible for society to embrace *both* the disentanglement solution and the same-sex marriage solution. In fact, the disentanglement solution may make it easier to gain support for same-sex marriage because marriage extension will be purely symbolic rather than benefit-granting.

Some voices in Canada have embraced a disentanglement rather than extension solution.[193] Professor Holland, who teaches at the University of Western Ontario, has observed: "[i]t is impossible to consider reform options without questioning why our whole focus is on *sexual-romantic relationships* rather than on a wider range of

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191. *See supra* note 5 (discussing GAO Report).

192. This same problem also exists under civil union statutes. For example, the Connecticut civil union statute makes the benefits of civil union available only to same-sex partners. *See* 2005 Conn. Legis. Serv. 05-10 (West) (approved Apr. 20, 2005). Opposite-sex couples who want the benefits of marriage must enter the institution of marriage itself. Vermont's civil union statute also limits that category to same-sex couples. *See* VT. STAT. ANN. tit. 15, § 1202(2) (2002). The civil union approach has therefore served to reinforce the marriage-mimicry model by insisting that individuals enter marriage or civil union to get benefits and preferring marriage over civil union for opposite-sex couples.

193. *See* Winifred Holland, *Intimate Relationships in the New Millennium: The Assimilation of Marriage and Cohabitation?*, 17 CAN. J. FAM. L. 114, 120-21 (2000) (arguing that the model should be functional and based on cohabitation). Steven Homer has also questioned the relationship between marriage and state-provided benefits:

> Marriage has been described as having "positive values," and contributing to "community stability." That the state has an interest in promoting marriage because of the social good marriage does is a circular argument, since marriage only performs those goods because the state assigns them to marriage or gives it a monopoly on them.

Homer, *supra* note 1, at 529.

relationships ...."[194] Yet, the marriage extension strategy coupled with marriage mimicry in the United States has caused us not to ask those fundamental, functional questions. By focusing on the law of domestic violence, this Article has sought to begin that conversation. We should have a sunset clause on the 1049 federal provisions that tie benefits to marriage and use a functional approach to determine the criteria for procuring those benefits. Such an approach would better serve the interests of society and even appeal to fiscal conservatives by helping us use our resources more wisely.

194. Holland, *supra* note 193, at 117-18.

Appendix A[195]

Domestic Violence Statutes in 1988

State	Mandatory Arrest	Primary Aggressor Language in Mandatory Arrest	Warrantless Arrest	Mandatory Arrest for Restraining Order Violation	Require Spousal Abuse To Be Considered in Custody Determination	Mandatory Police Training	Mandated Statewide Data Collection	No Policies
Alabama								X
Alaska			X		X			
Arizona			X		X			
Arkansas								X
California			X		X	X	X	
Colorado					X			
Connecticut	X		X					
Delaware				X				
District of Columbia								X
Florida			X		X			
Georgia			X					
Hawaii			X					
Idaho			X					
Illinois			X		X			
Indiana								X
Iowa	X				X			
Kentucky			X		X			
Louisiana	X		X					
Maine	X		X	X		X	X	
Maryland								X
Massachusetts	X					X	X	
Michigan			X					
Minnesota			X	X				

Mississippi								X
Missouri						X		
Montana		X					X	
Nebraska						X		
Nevada	X		X	X				
New Hampshire			X					
New Jersey			X					
New Mexico			X					
New York			X					
North Carolina	X		X	X				
North Dakota			X					
Ohio			X			X		
Oklahoma								X
Oregon	X (first)	X	X	X				
Pennsylvania						X		
Rhode Island			X					
South Carolina								X
South Dakota			X					
Tennessee								X
Texas			X		X			
Utah			X					
Vermont			X					
Virginia			X					
Washington	X	X	X	X	X	X		
West Virginia	X							
Wisconsin	X	X (model)		X		X		
Wyoming						X		

195. *See* MacManus & Van Hightower, *supra* note 51, at 274 tbl.4.

Appendix B

Domestic Violence Statutes as Applied to Relationships Other than Marriage

State	Only Protects Opposite-Sex Partners	Protective Orders: Dating Relationship	Protective Orders: Cohabitation	Protective Orders: Pregnant Women	Criminal Liability	Same-Sex Marriage Ban
Alabama	Protects individuals who are opposite sex and "living as spouses." ALA. CODE § 15-23-41(5) (LexisNexis 1995) (definition for family counseling confidentiality).		Protects "person with whom the plaintiff has a child in common, or a present or former household member." ALA. CODE § 30-5-2(a)(4) (LexisNexis 1998).		"[V]ictim is a current or former spouse, parent, child, any person with whom the defendant has a child in common, a present or former household member, or a person who has or had a dating or engagement relationship with the defendant." ALA. CODE § 13A-6-130 (a) (LexisNexis Supp. 2004). Criminal code protects those in a dating relationship; protective order does not.	ALA. CODE § 30-1-19 (LexisNexis 1998). Constitutional amendment on ballot on June 6, 2006.
Alaska		Protects persons "who are dating or who have dated." ALASKA STAT. § 18.66.990(C)(5) (2004).	Protects persons "who live together or who have lived together." ALASKA STAT. § 18.66.990(B)(5) (2004).		Same coverage for protective order and criminal liability. ALASKA STAT. § 18.65.590 (2004).	ALASKA CONST. art. I, § 25; ALASKA STAT. § 25.05.011 (2004).
Arizona			Protects individuals if "[t]he relationship between the victim and the defendant is one of marriage or former marriage or of persons residing or having resided in the same household." ARIZ. REV. STAT. ANN. § 13-3601.A.1. (Supp. 2005).	Protects individual if "[t]he victim or the defendant is pregnant by the other party." ARIZ. REV. STAT. ANN. § 13-3601.A.3. (Supp. 2005).	Same coverage for protective order and criminal liability. ARIZ. REV. STAT. ANN. § 13-3602.C.4. (Supp. 2005).	ARIZ. REV. STAT. ANN. § 25-901 (2000) (covenant marriage). ARIZ. REV. STAT. ANN. § 25-101 (2005).
Arkansas		Protects persons who are in a dating relationship, which is defined as a "romantic or intimate social relationship between two (2) individuals." 2005-6 Ark. Adv. Legis. Serv. 1091 (LexisNexis).	Protects "persons who presently or in the past have resided or cohabited together." ARK. CODE ANN. § 9-15-103(3) (Supp. 2005).		Protects persons who "are presently or in the past have been in a dating relationship together." Dating relationship shall not include a casual relationship or ordinary fraternization between two individuals in a business or social context. 2005-06 Ark. Adv. Legis. Serv. 1090-91 (LexisNexis) (approved by governor on April 8, 2005) (definition for criminal domestic battery statute). Covers "[s]pouses," "[f]ormer spouses," and "[p]ersons who presently or in the past have resided or cohabited together." ARK. CODE ANN. § 5-26-302 (Supp. 2005) (definition for criminal domestic battery statute).	"[L]egal status for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized in Arkansas." ARK. CONST. amend. LXXXIII, § 1; ARK. CODE ANN. § 9-11-109 (2002).
California		Protects person who "is having or has had a dating relationship." CAL. FAM. CODE § 6211(c) (West 2004).	Protects "cohabitant or former cohabitant." CAL. FAM. CODE § 6211(b) (West 2004).		Same coverage for protective order and criminal liability. CAL. PENAL CODE § 243(e)(1) (West 1999). Dating relationship defined as "frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement independent of financial considerations." CAL. PENAL CODE § 243 (f)(10) (West 1999).	CAL. FAM. CODE §§ 300, 308.5 (West 2004).

Colorado		Defines "domestic abuse" to include those with whom the actor is "involved or has been involved in an intimate relationship." COLO. REV. STAT. § 13-14-101(2) (2004).	Defines "domestic abuse" as violence committed or threatened by an adult or emancipated minor living "in the same domicile." COLO. REV. STAT. § 13-14-101(2) (2004).		Criminal code covers "a person with whom the actor is or has been involved in an intimate relationship." "Intimate relationship" means "a relationship between spouses, former spouses, past or present unmarried couples, or persons who are both the parents of the same child regardless of whether the persons have been married or have lived together at any time." COLO. REV. STAT. § 18-6-800.3 (2004). "Intimate relationship" defined for purposes of criminal code but not for protective orders; protective orders available for cohabitants without proof of intimacy.	COLO. REV. STAT. § 14-2-104 (2004).
Connecticut		"Protects person who has recently been in, a dating relationship with the alleged abuser." CONN. GEN. STAT. ANN. § 46b-15(9) (West 2004).	Protects any "family or household member" which is defined as including persons sixteen years or older presently residing together or who have resided together. CONN. GEN. STAT. ANN. § 46b-38a(2) (West 2004).		Same coverage for protective order and criminal liability. CONN. GEN. STAT. ANN. § 46b-38h (West 2004).	CONN. GEN. STAT. ANN. § 46a-81r(4) (West 2004) (sexual orientation nondiscrimination statute should not be interpreted to "authorize the recognition of or the right of marriage between persons of the same sex.").
Delaware	Protects "a man and a woman co-habitating together with or without a child of either or both, or a man and a woman living separate and apart with a child in common." DEL. CODE ANN. tit. 10, § 1041(2)(b) (1999).				Criminal code has broader definition; also includes "a person who cohabited with the victim at the time of the offense." DEL. CODE ANN. tit. 11, § 3906 (2001).	DEL. CODE ANN. tit. 13, § 101 (1999).
District of Columbia		Protects individuals who have a "romantic relationship not necessarily including a sexual relationship." D.C. CODE § 16-1001(6) (2001).	Protects individuals who share a "mutual residence." D.C. CODE § 16-1001(6) (2001).		Same coverage for protective order and criminal liability. D.C. CODE §§ 16-1001 to -1003 (2001).	
Florida			Protects "spouses, former spouses, persons related by blood or marriage, persons who are presently residing together as if a family or who have resided together in the past as if a family, and persons who are currently residing or have in the past resided together in the same single dwelling unit." FLA. STAT. ANN. § 741.28(3) (West 2006). "No person [is precluded from relief] solely on the basis that such a person is not a spouse." FLA. STAT. ANN. § 741.30(1)(e) (West 2006).		Same coverage for protective order and criminal liability. FLA. STAT. ANN. § 741.283 (West 2006).	FLA. STAT. ANN. § 741.212 (West 2006).

Appendix B

Domestic Violence Statutes as Applied to Relationships Other than Marriage

Georgia	Protects "spouses ... or other persons related by consanguinity or affinity and occupying a common domicile." GA. CODE ANN. § 19-13-20(2) (2004) (definition for availability of domestic violence shelter).		Protects "persons living or formerly living in the same household." GA. CODE ANN. § 19-13-1 (2004).		Same coverage for protective order and criminal liability. GA. CODE ANN. § 16-5-20 (Supp. 2005).	"No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage." GA. CONST. art. I, § 4, ¶ I.(b).
Hawaii		Protects persons in a dating relationship which is defined as "a romantic, courtship, or engagement relationship, often but not necessarily characterized by actions of an intimate or sexual nature." HAW. REV. STAT. § 586-1 (Supp. 2004). Explicitly covers "reciprocal beneficiaries." HAW. REV. STAT. § 586-1 (Supp. 2004).	Protects persons "jointly residing or formerly residing in the same dwelling unit." HAW. REV. STAT. § 586-1 (Supp. 2004).		Criminal code protects "spouses or reciprocal beneficiaries, former spouses or reciprocal beneficiaries, persons who have a child in common, parents, children, persons related by consanguinity, and persons jointly residing or formerly residing in the same dwelling unit." HAW. REV. STAT. § 709-906(1) (Supp. 2004). Criminal code does not protect persons in a dating relationship.	HAW. REV. STAT. § 572-1 (Supp. 2004).
Idaho		Protects a "person with whom the adult has had or is having a dating relationship." IDAHO CODE ANN. § 39-6303(1) (Supp. 2005). Defines "dating relationship" as a "social relationship of a romantic nature." IDAHO CODE ANN. § 39-6303(2) (Supp. 2005).	Protects "household member" which is defined as including "persons who reside or who have resided together." IDAHO CODE ANN. § 39-6303(6) (Supp. 2005).		Criminal code protects a "spouse, former spouse, or a person who has a child in common regardless of whether they have been married or a person with whom a person is cohabiting, whether or not they have married or have held themselves out to be husband or wife." IDAHO CODE ANN. § 18-918(1)(a) (2005). Criminal code does not protect persons in a dating relationship.	IDAHO CODE ANN. § 32-201 (1996).
Illinois		Protects individual in "a dating or engagement relationship." 750 ILL. COMP. STAT. ANN. 60/103(6) (West Supp. 2005).	Protects "persons who share or formerly shared a common dwelling." 750 ILL. COMP. STAT. ANN. 60/103(6) (West Supp. 2003).		Same coverage for protective order and criminal liability. 725 ILL. COMP. STAT. ANN. 5/112A-3 (West 1992).	750 ILL. COMP. STAT. ANN. 5/201 (West 1999).
Indiana		Criminal code uses "similarly situated to a spouse" language. IND. CODE ANN. § 35-41-1-63(2) (LexisNexis 2004).	Protects "family or household member" which is defined to include another person if the individual "is dating or has dated the other person" or "is or was engaged in a sexual relationship with the other person." IND. CODE ANN. § 12-18-8-3 (LexisNexis Supp. 2005).	Protects household member; also protects victims of stalking even if not committed by a family or household member. IND. CODE ANN. § 34-6-2-34.5 (LexisNexis Supp. 2003).	Protects "(A) current or former spouse, parent, or guardian of the defendant; (B) person with whom the defendant shared a child in common; (C) person who was cohabiting with or had cohabited with the defendant as a spouse, parent, or guardian; or (D) person who was or had been similarly situated to a spouse, parent, or guardian of the defendant." IND. CODE ANN. § 35-41-1-6.3(2) (LexisNexis 2004). Criminal code protects more narrow category than protective order.	IND. CODE ANN. § 31-11-1-1 (LexisNexis 2003).

Iowa		Protects persons "who are in an intimate relationship or have been in an intimate relationship and have had contact within the past year of the assault." IOWA CODE ANN. § 236.2(2)(e) (West Supp. 2005). An intimate relationship is defined as "a significant romantic involvement that need not include sexual involvement. An intimate relationship does not include casual social relationships or associations in a business or professional capacity." IOWA CODE ANN. § 236.2(5) (West Supp. 2005).	Protects persons who are "cohabiting." IOWA CODE ANN. § 236.2(4)(a) (West Supp. 2005).		Same coverage for protective order and criminal liability.	IOWA CODE ANN. § 595.2 (West 2001).
Kansas		Protects "intimate partners" which is defined as "persons who are or have been in a dating relationship." "Dating relationship" means "a social relationship of a romantic nature." KAN. STAT. ANN. §§ 60-3102(b), (c) (Supp. 2004).	Protects persons who are household members, which is defined as "persons who reside together or who have formerly resided together." KAN. STAT. ANN. § 60-3102(b) (Supp. 2004).	Pregnant women protected under criminal code but not eligible for protective order.	Protects "spouses, former spouses, parents or stepparents and children or stepchildren, and persons who are presently residing together or who have resided together in the past, and persons who have a child in common ... [and] a man and woman if the woman is pregnant and the man is alleged to be the father, regardless of whether they have been married or have lived together at any time." KAN. STAT. ANN. § 21-3412a(c)(1) (Supp. 2004). Dating relationship not covered under criminal code; pregnant women not covered under protective order.	KAN. CONST. art. 15, § 16 (b); KAN. STAT. ANN. §§ 23-101, 23-115 (Supp. 2004). "No relationship, other than marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage."
Kentucky			Protects "[m]ember of an unmarried couple" which is defined as "each member of an unmarried couple which allegedly has a child in common, ... or a member of an unmarried couple who are living together or have formerly lived together." KY. REV. STAT. ANN. § 403.720(3) (LexisNexis 1999).		Same coverage for protective order and criminal liability.	"A legal status identical or substantially similar to that of marriage for unmarried individuals shall be not valid or recognized." KY. CONST. § 233A; KY. REV. STAT. ANN. § 402.005 (LexisNexis 1999).
Louisiana	Protects spouses and "any person of the opposite sex presently or formerly living in the same residence with the defendant as a spouse, whether married or not." LA. REV. STAT. ANN. § 46:2132(4) (Supp. 2005).	Also provides that "all services, benefits, and other forms of assistance" to a "dating partner" who is defined as someone "who is or has been in a social relationship of a romantic or intimate nature with the victim." LA. REV. STAT. ANN. §§ 46:2151(A)-(B) (Supp. 2005).			Protects "any person of the opposite sex presently living in the same residence or living in the same residence within five years of the occurrence of the domestic abuse battery with the defendant as a spouse, whether married or not." LA. REV. STAT. ANN. § 14:35.3(B)(2) (Supp. 2005). Criminal liability has requirement that lived together within past five years.	LA. CONST. art. XII, § 15; LA. CIV. CODE ANN. arts. 86, 89 (1999 & Supp. 2005). Like Ohio, domestic violence statute refers to a person "living as a spouse."

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Maine		Protects individuals who "are or were sexual partners." ME. REV. STAT. ANN. tit. 19-A, § 4002(4) (Supp. 2004).	Protects "spouses or domestic partners or former spouses or former domestic partners." "Domestic partners" are defined as "[two] unmarried adults who are domiciled together under long-term arrangements that evidence a commitment to remain responsible indefinitely for each other's welfare." ME. REV. STAT. ANN. tit. 19-A, § 4002(4) (Supp. 2004).		Same coverage for protective order and criminal liability ME. REV. STAT. ANN. tit. 17-A, § 15(1)AX5-A) (Supp. 2004).	ME. REV. STAT. ANN. tit. 19-A, § 701 (1998).
Maryland			Protects a "cohabitant" which is defined as "a person who has had a sexual relationship with the respondent and resided with the respondent in the home for a period of at least 90 days within 1 year before the filing of the petition." MD. CODE ANN., FAM. LAW § 4-501(d) (West Supp. 2005).		Coverage for warrantless arrest if "the person battered the person's spouse or another person with whom the person resides." MD. CODE ANN., CRIM. PROC. § 2-204(a)(1)(i) (West 2004). No requirement for sexual relationship for criminal law to apply.	MD. CODE ANN., FAM. LAW § 2-201 (West 2004).
Massachusetts		Protects individuals in a "substantive dating or engagement relationship" as determined by court. MASS. GEN. LAWS ch. 209A, § 1(e) (1998).	Protects "family or household member." MASS. GEN. LAWS ch. 209A, § 6 (1998).		Same coverage for protective order and warrantless arrest.	
Michigan		Protects an "individual with whom the person has or has had a dating relationship" and "[a]n individual with whom the person is or has engaged in a sexual relationship." MICH. COMP. LAWS ANN. § 400.1501(e) (West Supp. 2005).	Protects "[a]n individual with whom the person resides or has resided." MICH. COMP. LAWS ANN. § 400.1501(e)(ii) (West Supp. 2005).		Same coverage for protective order and criminal liability. MICH. COMP. LAWS ANN. § 750.81a(2) (West 2004).	"[T]he union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose." MICH. CONST. art. I, § 25; MICH. COMP. LAWS ANN. §§ 551.1, 551.272 (West 2004).
Minnesota		Protects an individual in a "significant romantic or sexual relationship." MINN. STAT. ANN. § 518B.01(2)(b)(7) (West Supp. 2005).	Protects "persons who are presently residing together or who have resided together in the past." MINN. STAT. ANN. § 518B.01(2)(b)(4) (West Supp. 2005).	Protects "a man and woman if the woman is pregnant and the man is alleged to be the father, regardless of whether they have been married or have lived together at any time." MINN. STAT. ANN. § 518B.01(2)(b)(6) (West Supp. 2005).	Same coverage for protective order and criminal liability. MINN. STAT. ANN. § 609.2242 (West 2003).	MINN. STAT. ANN. § 517.01 (West Supp. 2005).

Mississippi		Protects individual in a "current dating relationship" which is defined as a "social relationship of a romantic or intimate nature." MISS. CODE ANN. §§ 93-21-3(a), (d) (West Supp. 2004).	Protects persons "who reside together or who formerly resided together." MISS. CODE ANN. § 93-21-3(a) (West Supp. 2004).		Same coverage for protective order and criminal liability. MISS. CODE ANN. § 99-3-7(3)(a) (West Supp. 2004). Dating relationship must be current.	"Marriage may take place and may be valid under the laws of this state only between a man and a woman." MISS. CONST. art. XIV, § 263A.
Missouri		Protects an "adult who is or has been in a continuing social relationship of a romantic or intimate nature with the victim." MO. ANN. STAT. § 455.010(5) (West 2003).	Protects "adults who are presently residing together or have resided together in the past." MO. ANN. STAT. § 455.010(5) (West 2003).		Same coverage for protective order and criminal liability. MO. ANN. STAT. § 565.072 (West Supp. 2005).	MO. ANN. STAT. § 451.022 (West 2003).
Montana	"Partner" for domestic violence purposes is limited to persons of the opposite sex. MONT. CODE ANN. § 45-5-206(2)(b) (2005).	Protects "partners" which is defined as "spouses, former spouses, persons who have a child in common, and persons who have been or are currently in a dating or ongoing intimate relationship with a person of the opposite sex." MONT. CODE ANN. § 45-5-206(2)(b) (2005).	Protects family members which includes "past or present family members of a household." MONT. CODE ANN. § 45-5-206(2)(a) (2005).		Same coverage for protective order and criminal liability. MONT. CODE ANN. § 40-15-102 (2005).	MONT. CODE ANN. §§ 40-1-103, 40-1-401(1)(d) (2005).
Nebraska		Protects individuals in a "dating relationship." Dating relationship defined as "frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement, but does not include a casual relationship or an ordinary association between persons in a business or social context." NEB. REV. STAT. § 42-903(3) (2004).	Protects "persons who are presently residing together or who have resided together in the past." NEB. REV. STAT. § 42-903(3) (2004).		Protects "intimate partner" which is defined as "a spouse; a former spouse; persons who have a child in common whether or not they have been married or lived together at any time; and persons who are or were involved in a dating relationship. For purposes of this subsection, dating relationship means frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement, but does not include a casual relationship or an ordinary association between persons in a business or social context." NEB. REV. STAT. § 28-323(7) (Supp. 2004). Criminal law does not protect cohabitants who are not intimate.	NEB. CONST. art. I, § 29.
Nevada		Only uses male pronouns to describe the perpetrator of domestic violence. Protects individual in a dating relationship which is defined as "frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement. The term does not include a casual relationship or an ordinary association between persons in a business or social context." NEV. REV. STAT. ANN. § 33.018(2) (LexisNexis 2002).	Only uses male pronouns to describe the perpetrator of domestic violence. Protects "person with whom he is or was actually residing." NEV. REV. STAT. ANN. § 33.018(1) (LexisNexis 2002).		Same coverage for protective order and criminal liability. NEV. REV. STAT. ANN. § 200.485 (LexisNexis Supp. 2005).	"Only a marriage between a male and female person shall be recognized and given effect in this state." NEV. CONST. art. I, § 21.

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New Hampshire		Protects "intimate partners" which is defined as "persons currently or formerly involved in a romantic relationship, whether or not such relationship was ever sexually consummated." N.H. REV. STAT. ANN. § 173-B:1(XV) (LexisNexis 2001).	Protects "persons cohabiting with each other, and persons who cohabited with each other but who no longer share the same residence." N.H. REV. STAT. ANN. § 173-B:1(x) (LexisNexis 2001).		Same coverage for protective order and criminal liability. N.H. REV. STAT. ANN. § 173-B:10 (LexisNexis 2001); N.H. REV. STAT. ANN. § 594:10 (LexisNexis 2003).	N.H. REV. STAT. ANN. §§ 457:1, 457:2 (1992).
New Jersey		Protects any "person with whom the victim has had a dating relationship." N.J. STAT. ANN. § 2C:25-19(d) (West 2005).	Protects "any other person who is a present or former household member." N.J. STAT. ANN. § 2C:25-19(d) (West 2005).	"Victim of domestic violence" also includes "any person, regardless of age, who has been subjected to domestic violence by a person with whom the victim has a child in common, or with whom the victim anticipates having a child in common, if one of the parties is pregnant." N.J. STAT. ANN. § 2C:25-19(d) (West 2005).	Same coverage for protective order and criminal liability. N.J. STAT. ANN. § 2C:25-19 (West 2005).	
New Mexico		Protects a "person with whom the petitioner has had a continuing personal relationship. Cohabitation is not necessary to be deemed a household member for purposes of this section." N.M. STAT. ANN. § 40-13-2(D) (West 2003).			Same coverage for protective order and criminal liability. N.M. STAT. ANN. § 30-3-11 (West 2003).	
New York			Protects persons "who are continually or at regular intervals living in the same household or who have in the past continually or at regular intervals lived in the same household." N.Y. SOC. SERV. LAW § 459-a(2)(e) (Consol. 1994).		Provides for indeterminate sentencing for persons who commit domestic violence and are legally married, formerly married or have a child in common. N.Y. PENAL LAW § 60.12 (Consol. Supp. 2005); N.Y. FAM. CT. ACT § 812 (Consol. Supp. 2005); N.Y. CRIM. PROC. § 530.11 (Consol. Supp. 2005). Criminal law applies to a more narrow category than protective order.	
North Carolina	Protects members "of the opposite sex who are in a dating relationship." N.C. GEN. STAT. § 50B-1(b)(6) (2003).	A "dating relationship is one wherein the parties are romantically involved over time and on a continuous basis during the course of the relationship. A casual acquaintance or ordinary fraternization between persons in a business or social context is not a dating relationship." N.C. GEN. STAT. § 50B-1(b)(6) (2003).	Protects "persons of the opposite sex who live together or have lived together." N.C. GEN. STAT. § 50B-1(b)(2) (2003).		Protects "spouse or former spouse or a person with whom the defendant lives or has lived as if married." N.C. GEN. STAT. § 15A-534.1(a) (2003). Criminal law applies to a more narrow category than protective order; appears to be limited to opposite-sex partners and those who fit a marital model.	N.C. GEN. STAT. § 51-1 (2003).

North Dakota		Protects "persons who are in a dating relationship." Also has broad catch-all phrase to include "any other persons with a sufficient relationship to the abusing person as determined by the court." N.D. CENT. CODE § 14-07.1-01(4) (2004).	Protects persons "who are presently residing together or who have resided together in the past." N.D. CENT. CODE § 14-07.1-01(4) (2004).		Same coverage for protective order and criminal liability. N.D. CENT. CODE § 12.1-17-01 (Supp. 2005).	"No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect." N.D. CONST. art XI, § 28; N.D. CENT. CODE §§ 14-03-01, -08 (2004).
Ohio	Explicitly uses "living as a spouse" language in both the criminal and civil codes. OHIO REV. CODE ANN. § 2919.25(F)(2) (West Supp. 2004) (criminal code). OHIO REV. CODE ANN. § 3113.31(3)-(4) (West Supp. 2004) (civil code).		Protects person "living as a spouse" which is defined as a "person who is living or has lived with the offender in a common law marital relationship, who otherwise is cohabiting with the offender, or who otherwise has cohabited with the offender within five years prior to the date of the alleged commission of the act in question." OHIO REV. CODE ANN. § 3113.31(4) (West Supp. 2004).		"Living as spouse" requirement for both civil and criminal protection. OHIO REV. CODE ANN. § 2919.25(F)(2) (West Supp. 2004).	"This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage." OHIO CONST. art. XV, § 11; OHIO REV. CODE ANN. § 3101.01 (West Supp. 2004).
Oklahoma		Protects individual in a "dating relationship" which is defined as "courtship or engagement relationship." OKLA. STAT. ANN. tit. 22, § 60.1(5) (West 2003).	Protects "persons living in the same household or who formerly lived in the same household." OKLA. STAT. ANN. tit. 22, § 60.1(4)(g) (West 2003).		Same coverage for protective order and criminal liability. OKLA. STAT. ANN. tit. 21, § 644 (West Supp. 2005).	"Neither this Constitution nor any other provision of law shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups." OKLA. CONST. art. II, § 35.
Oregon		Protects "[p]ersons who have been in a sexually intimate relationship with each other within two years." OR. REV. STAT. § 107.705(e) (2002).	Protects "[p]ersons who are cohabiting or who have cohabited with each other." OR. REV. STAT. § 107.705(d) (2002).		Same coverage for protective order and criminal liability. OR. REV. STAT. § 133.055 (2002).	
Pennsylvania	Uses "living as spouses" language. 23 PA. CONS. STAT. ANN. § 6102(a) (West 2001).	Protects "sexual or intimate partners." 23 PA. CONS. STAT. ANN. § 6102(a) (West 2001).	Protects persons "living as spouses." 23 PA. CONS. STAT. ANN. § 6102(a) (West 2001).		Same coverage for protective order and criminal liability. 18 PA. CONS. STAT. ANN. § 2711 (West Supp. 2005).	23 PA. CONS. STAT. ANN. §§ 1102, 1704 (West 2001).

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Rhode Island		Protects "persons who are or have been in a substantive dating or engagement relationship within the past one year which shall be determined by the court's consideration of the following factors: (1) the length of time of the relationship; (2) the type of the relationship; (3) the frequency of the interaction between the parties." R.I. GEN. LAWS § 12-29-2(b) (2002).	Protects "adult persons who are presently residing together or who have resided together in the past three (3) years." R.I. GEN. LAWS § 12-29-2(b) (2002).		Same coverage for protective order and criminal liability. R.I. GEN. LAWS § 8-8.1-1 (Supp. 2005).	
South Carolina	Protects "male and female who are cohabiting or formerly have cohabited." S.C. CODE ANN. § 20-4-20(b) (Supp. 2003).		Protects "male and female who are cohabiting or formerly have cohabited." S.C. CODE ANN. § 20-4-20(b) (Supp. 2003).		Same coverage for protective order and criminal liability. S.C. CODE ANN. § 16-25-10 (Supp. 2003).	H.R. 3133, 116th Gen. Assemb., Reg. Sess. (S.C. 2005) (proposed Constitutional amendment to be on ballot in Nov. 2006). S.C. CODE ANN. § 20-1-10 (Supp. 2003).
South Dakota			Protects "persons living in the same household, persons who have lived together." S.D. CODIFIED LAWS § 25-10-1(2) (Supp 2005).		Same coverage for protective order and criminal liability. S.D. CODIFIED LAWS § 25-10-36 (2004).	S.D. CODIFIED LAWS § 25-1-1 (2004). H.J.R. 1001, 80th Leg. Assemb. (S.D. 2005) (amendment on ballot in Fall 2006).
Tennessee		Protects persons "who are dating or who have dated or have or had a sexual relationship." TENN. CODE ANN. § 36-3-601(8)(C) (Supp. 2004).	Protects persons "who live together or who have lived together." TENN. CODE ANN. § 36-3-601(8)(B) (Supp. 2004).		Same coverage for protective order and criminal liability. TENN. CODE ANN. § 39-13-102 (2003).	TENN. CONST. art. XI, § 18 (amendment will be on ballot in Nov. 2006); TENN. CODE ANN. § 36-3-113 (2001).
Texas		Protects persons in a "dating relationship" which is defined as "a relationship between individuals who have or have had a continuing relationship of a romantic or intimate nature." TEX. FAM. CODE ANN. § 71.0021(b) (Vernon 2002).	Protects persons "living together in the same dwelling." TEX. FAM. CODE ANN. § 71.006 (Vernon 2002). Also protects "person who previously lived in a household." TEX. FAM. CODE ANN. § 71.006 (Vernon 2002).		Same coverage for protective order and criminal liability. TEX. FAM. CODE ANN. § 71.004 (Vernon 2002).	TEX. CONST. art. I, § 32; TEX. FAM. CODE § 2.001 (Vernon 1998).
Utah			Protects cohabitants which is defined as someone who "resides or has resided in the same residence as the other party." UTAH CODE ANN. § 30-6-1(2)(f) (Supp. 2005).	"[I]s the biological parent of the other party's unborn child." UTAH CODE ANN. § 30-6-1(2)(e) (Supp. 2005).	Same coverage for protective order and criminal liability. UTAH CODE ANN. § 77-36-1 (2003).	"No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect." UTAH CONST. art. I, § 29; UTAH CODE ANN. §§ 30-1-2, -1-4.1 (Supp. 2005).

Vermont		Protects persons who "are engaged or have engaged in sexual relationship." VT. STAT. ANN. tit. 15, § 1101(2) (2002). Definition of "family" updated to include a "reciprocal beneficiary." VT. STAT. ANN. tit. 15, § 1101(6) (2002). Also protects "minors or adults who are dating or who have dated." "Dating" means "a social relationship of a romantic nature." VT. STAT. ANN. tit. 15, § 1101(2) (2002).	Protects persons "who, for any period of time, are living or have lived together, are sharing or have shared occupancy of a dwelling." VT. STAT. ANN. tit. 15, § 1101(2) (2002).		Same coverage for protective order and criminal liability. VT. STAT. ANN. tit. 13, § 1042 (1998).	VT. STAT. ANN. tit. 15, § 8 (2002).
Virginia			Protects "any individual who cohabits or who, within the previous 12 months, cohabited with the person." VA. CODE ANN. § 16.1-228 (Supp. 2005).		Same coverage for protective order and criminal liability. VA. CODE ANN. § 18.2-57.2 (2004).	VA. CODE ANN. § 20-45.2 (2004).
Washington		Protects individuals in a dating relationship which is defined as "a social relationship of a romantic nature." WASH. REV. CODE ANN. § 26.50.010(3) (West 2005).	Protects persons "who are presently residing together or who have resided together in the past." WASH. REV. CODE ANN. § 26.50.010(2) (West 2005).		Same coverage for protective order and criminal liability. WASH. REV. CODE ANN. § 10.99.020 (West Supp. 2005).	WASH. REV. CODE ANN. § 26.04.020 (West 2005).
West Virginia	Uses "living together as spouses" language in protective order coverage. W. VA. CODE ANN. § 48-27-204(2) (LexisNexis 2004).	Protects "sexual or intimate partners." W. VA. CODE ANN. § 48-27-204(3) (LexisNexis 2004). Protects individuals who are dating so long as not "a casual acquaintance or ordinary fraternization between persons in a business or social context." W. VA. CODE ANN. § 48-27-204(4) (LexisNexis 2004).	Protects individuals who are "living together as spouses;" "[a]re or were residing together in the same household." W. VA. CODE ANN. § 48-27-204(2), (5) (LexisNexis 2004).		Same coverage for protective order and criminal liability. W. VA. CODE ANN. § 61-2-28 (LexisNexis 2005).	"A public act, record or judicial proceeding of any other state, territory, possession or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of the other state, territory, possession, or tribe, or a right or claim arising from such relationship, shall not be given effect by this state." W. VA. CODE ANN. § 48-2-603 (LexisNexis 2004).

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Wisconsin	"Protects persons in a dating relationship" which "does not include a casual relationship or an ordinary fraternization between 2 *individuals in a* business or social context." WIS. STAT. ANN. § 813.12(1)(ag) (West Supp. 2004).	Protects person against "adult household member." WIS. STAT. ANN. § 813.12(1)(am) (West Supp. 2004)			Protects person "against his or her spouses or former spouse, against an adult with whom the person resides or formerly resided or against an adult with whom the person has a child in common." WIS. STAT. ANN. § 968.075 (West 1998). Criminal liability more narrow than protective order; does *not* include dating relationship.	"Under the laws of this state, marriage is a legal relationship between 2 equal persons, a husband and wife, who owe to each other mutual responsibility and support." WIS. STAT. ANN. § 765.001 (West 2001).
Wyoming	*Protects persons* "who are in, or have been in, a dating relationship." WYO. STAT. ANN. § 35-21-102(a)(iv)(H) (2005).	*Protects individuals if living* together as if married or "[o]ther adults sharing common living quarters." WYO. STAT. ANN. § 35-21-102(a)(iv)(F) (2005).			Same coverage for protective order and criminal liability. WYO. STAT. ANN. § 6-2-501 (2005).	WYO. STAT. ANN. § 20-1-101 (2005).